THE NORTHERN IRELAND LAW REPORTS.

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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL.

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Lords Justices of Appeal:

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THE RIGHT HON. RICHARD BEST.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A. PAGE

Alice Trainor, *In re* .. 197

B.

Bradley *v.* McAtamney .. 74

C.

Coates' Buildings, Ltd., *In re* 156
Cooney *v.* Taylor 158
Cooper, Garbett *v.* 64
Craig *v.* Hamill 78
Crozier, Stinson *v.* 203

D.

Down (Justices of), R. (Brooks) *v.* 115

G.

Gallagher, R. (Lynn) *v.* .. 131
Garbett *v.* Cooper 64
Gass, R. (King) *v.* 144

H.

Hamill, Craig *v.* 78
Hanna & Others *v.* Irish Sailors' and Soldiers' Land Trust 45
Haughey, R. (Emerson) *v.* .. 186

I.

Irish Sailors' and Soldiers' Land Trust, Hanna & Others *v.* 45

M.

McAtamney, Bradley v. .. 74
McGrath *v.* Taylor 158
Murphy & Others, O'Neill *v.* 16

O. PAGE

O'Neill *v.* Murphy & Others 16

R.

Rex (Allen) *v.* Justices of County Tyrone 1
Rex (Brooks) *v.* Justices of County Down 115
Rex (Emerson) *v.* Haughey 186
Rex (King) *v.* Gass 144
Rex (Lynn) v. Gallagher .. 131
Rex (McCaughey) *v.* Justices of Co. Tyrone 10
Rex (M'Clave) *v.* Justices of Co. Tyrone 69

S.

Stinson *v.* Crozier 203

T.

Taylor, Cooney *v.* 158
Taylor, McGrath *v.* 158
Tyrone (Justices of), R. (Allen) *v.* 1
Tyrone (Justices of), R. (McCaughey) *v.* 10
Tyrone (Justices of), R. (McClave) *v.* 69

U.

Ulster Society for Prevention of Cruelty to Animals (Incorporated), *In re* .. 97

TABLE OF CASES CITED.

A.

PAGE

Allcard *v.* Skinner 25, 32, 42
Att. Gen. *v.* Delaney .. 25, 26
Att. Gen. v. Siddon .. 152, 153
Austin, *Ex parte* 70, 71, 72

B.

Bailey *v.* Curzon 79, 83, 84, 85, 93
Baldwin *v.* Tankard .. 184
Basébé *v.* Matthews .. 177
Bateman *v.* Pinder .. 35
Batten Pool *v.* Kennedy .. 50
Begbie *v.* Phosphate Sewage Co. 25
Blennerhassett *v.* Day .. 25, 42
Bolton *v.* Madden .. 24
Bourne *v.* Keane .. 21
Brady *v.* McDonald 79, 80, 81, 82, 85, 88, 90, 91, 92, 94, 95
British Coal Corporation *v.* The King .. 136
Brittain *v.* Kinnaird .. 121
Bynoe *v.* Bank of England 178

C.

Cane *v.* Mountain .. 123
Caus, *In re*, Lindeboom *v.* Camille .. 21, 25
Chapman *v.* Lamb 170, 173, 184
Colonial Bank of Australasia *v.* Willan .. 128
Cook *v.* Field .. 25
Corry Brothers & Co. *v.* Owners of Turkish Steamship "Mecca" .. 25, 26
Cumber *v.* Wane .. 31
Cunningham *v.* Cunningham 77

D.

Doe d. Bishop of Rochester *v.* Bridges .. 162
Dooley *v.* Hough .. 200
Dunican, *In re*, Dunican *v.* Dunican .. 77
Dunne *v.* Clinton .. 122

E.

Evans *v.* Powis .. 25

F.

Fairtitle *v.* Gilbert .. 49, 51
Fermanagh County Council *v.* Parker 163, 165, 166, 171
Foakes *v.* Beer .. 31
Fowler *v.* Wyatt .. 23
Frailey *v.* Charlton .. 151, 152

G.

PAGE

Garbett *v.* Cooper .. 65
Grosvenor, *In re*, Grosvenor *v.* Grosvenor .. 205

H.

Haigh *v.* Brooks .. 25
Hatch *v.* Hatch 21, 25, 42
Henrietta Muir Edwards *v.* Att. Gen. for Canada .. 137
Higgs *v.* Schrader .. 67
Horwood *v.* Statesman Publishing Co. 79, 84, 85, 93
Howarth *v.* Scott .. 90
Hugenin *v.* Baseley 25, 31, 42
Hussey's Estate, *In re* 200, 201

I.

Inch Noriah *v.* Shaik Allie Bin Omar .. 24
Incorporated Glasgow Dental Hospital *v.* Lord Advocate 100

J.

Jacobsohn *v.* Blake .. 122, 127
James *v.* Cowan 138, 139, 143
Johnston *v.* McKenzie 66, 67, 68

K.

Kircaldy Café Co., Ltd., *In re* 100

L.

Laugher *v.* Brefitt .. 184
Lee *v.* Arthur 80, 83, 84
Leggett & Others *v.* Irish Sailors' and Soldiers' Land Trust .. 51, 59
Leonard's Estate, *In re* .. 200, 201
Long *v.* Greville .. 24

M.

McCormack *v.* Grogan .. 22
McLean *v.* Scott 80, 82, 90
Maher *v.* Daly .. 67
Malone *v.* Great Northern Rly. Co. (Ir.) .. 80, 85
Mann *v.* Catherwood .. 80, 81
Mayor of Exeter *v.* Heaman 120, 123, 130
Metropolitan Rly. Co. *v.* Wright .. 23
Michael Walsh, *In re* .. 199
Morris *v.* Baron & Co. .. 25
Municipal Corporation of the City of Toronto *v.* Virgo 135, 140

O.

Oelkers, *v.* Ellis .. 25, 42
O'Hanlon *v.* Logue .. 25, 26
Onley *v.* Gee 119, 130
O'Shea *v.* Cork R.D.C. .. 51

P.

Patent Tyre Co., Ltd., *v. In re* 101
Payne *v.* British Time Recorder Co. .. 79, 94
Pea Nut Board *v.* Rockhampton Harbour Board 138
Pepe *v.* City and Suburban Permanent Building Society 100
Pinnel's Case .. 31
President and Governors of Magdalene Hospital *v.* Knotts 50

R.

R. *v.* Adamson .. 164
R. (Alexander) *v.* Ministry of Agriculture 132, 133
R. *v.* Bolton 121, 123, 128
R. (Carolan) *v.* Justices of Fermanagh 11, 12, 13
R. *v.* County Court Judge of Essex .. 163
R. (Deeny) *v.* Justices of Tyrone .. 164, 178
R. *v.* Eaton .. 121
R. (Greenaway) *v.* Justices of Armagh .. 128
R. (McBirney v. Henry) *v.* Justices of Armagh 3, 5, 150, 154
R. (McCaughey) *v.* Justices of Tyrone .. 72
R. (McConville) *v.* Justices of Armagh .. 12
R. (Martin) *v.* Mahony 120, 121, 123, 127, 128
R. (Meehan) *v.* Chairman and Justices of Tyrone .. 71, 72

PAGE

R. *v.* Russell .. 121, 129
R. (Sherry) *v.* County Court Judge of Fermanagh .. 15
R. *v.* St. Olive .. 128
R. v. Woodrow .. 153
Reid *v.* Dickens .. 24
River Steamer Company Mitchell's Claim, *In re* .. 25, 43
Roche *v.* O'Brien .. 25

S.

Scott *v.* Shearman 163, 165, 170, 176, 183
Sherras *v.* De Rutzen .. 151
Shuttleworth *v.* Cox Bros. & Co. (Maidenhead), Ltd. & Others .. 101
Society for Promoting Employment of Women, *In re* 100
Stevens *v.* Jeacocke .. 162
St. Hilda's Incorporated College, Cheltenham, *In re* 100, 101, 108

T.

Tinkler *v.* Poole 170, 173, 184

V.

Vanderberg *v.* Blake 176, 177, 178

W.

Willand *v.* Rawson .. 138
Wilson's Estate, *In re* .. 200
Wolverhampton New Waterworks *v.* Hawkesford .. 171
Woolmington *v.* Director of Public Prosecutions .. 196

Y.

York Corporation *v.* Leetham & Sons, Ltd. .. 50, 51

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

REX (ALLEN) *v.* JUSTICES OF COUNTY TYRONE (1).

K.B.D. 1934.

Oct. 31.

Customs—Questions put by Customs Officer—Failure to answer truly—No evidence of importation—Whether Regulation ultra vires—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36) *sections* 132, 147 *and* 168—*Irish Free State* (*Consequential Provisions*) *Act*, 1922, *Session* 2 (13 *Geo.* 5, *c.* 1) *section* 4 (1) *and* (2)—*Customs* (*Land Boundary*) *Regulations*. 1933, *Regulation* 12 (2).

The prosecutor was convicted at C. Petty Sessions for failing to answer truly, contrary to section 4 (1) and (2) of the Irish Free State (Consequential Provisions) Act, 1922, and Regulation 12 (2) of the Customs (Land Boundary) Regulations, 1933, questions, put to him by an officer of Customs, relating to the merchandise conveyed by him. No evidence was given that any of the cattle in question had ever been in the Irish Free State or had emanated therefrom.

The prosecutor obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the justices.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that as there was no evidence of importation there was no statutory obligation upon the prosecutor to answer truly the said questions.

Held also, that, save in so far as it related to importation and exportation the said regulation was *ultra vires*.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

K.B.D. 1934.

REX (ALLEN) v. JUSTICES OF COUNTY TYRONE.

CERTIORARI.

The prosecutor, James Allen, was convicted at the Castlederg Petty Sessions of the offence of having failed to answer truly, contrary to section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922, and Regulation 12 (2) of the Customs (Land Boundary) Regulations, 1933, questions, relating to the merchandise conveyed by him, put to him by an officer of customs.

At the hearing before the justices, evidence was given by Constable Carson that while on customs patrol duty in County Tyrone within twenty miles of the boundary of Northern Ireland and the Irish Free State he met the prosecutor driving eighteen head of cattle and that in pursuance of his duty he there questioned the prosecutor concerning these cattle and as to how the said cattle had come into possession of the prosecutor. That the prosecutor had answered that of the said cattle he had bought five bullocks from one Patrick Laverty, of Ardstraw, that he had bought one black heifer from Thomas Henderson, of Meaghey ; that three roan heifers and three red heifers were reared on his own farm and that the age of the last-mentioned six cattle varied from fifteen to eighteen months. That of the remaining five cattle one was bought from Joseph Maxwell, of Meaghey, and four were bought from Robert Todd, of Stoneyfalls.

Constable Carson gave further evidence that on examination, three of the six cattle described by the prosecutor as between fifteen and eighteen months of age were two or more years of age ; and that of the eighteen head of cattle there was only one black and one blue-black heifer.

During the hearing of the case the magistrate adjudicating went to see the cattle with the prosecutor and the said Thomas Henderson and Robert Todd. Thomas Henderson and Robert Todd having examined the eighteen head of cattle swore that the cattle which they had respectively sold to the prosecutor were not among the said eighteen cattle. The magistrate stated that he was satisfied that

the prosecutor had not truly answered the questions of Constable Carson regarding the said cattle.

No evidence was given that the cattle had been imported from the Irish Free State.

The prosecutor obtained a conditional order for a writ of certiorari to bring up and quash the conviction on the grounds that there was no evidence that any of the said cattle had ever been in the Irish Free State or had emanated therefrom ; and that Regulation 12 (2) of the Customs (Land Boundary) Regulations, 1933, under which the prosecution was brought was *ultra vires* the powers given the Commissioners of Customs and Excise by section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922. The prosecutor applied to have the conditional order made absolute notwithstanding cause shown.

Murphy, K.C., and *Sheil* for the prosecutor :—

Section 4 (1) of the Irish Free State (Consequential Provisions) Act, 1922, only gives the Commissioners of Customs and Excise power to make regulations with reference to the importation and exportation of any goods into and from Northern Ireland for the purpose of safeguarding the revenue and preventing and regulating the importation and exportation of prohibited and restricted goods. Before the magistrates can convict under a regulation made under that section there must be some evidence that the goods were imported into Northern Ireland. In this case there was no evidence that the cattle had been imported at all.

Regulation 12 (2) of the Customs Land Boundary Regulations, 1933, is not necessarily restricted, by its terms, to safeguarding the revenue and preventing and regulating the importation and exportation of prohibited and restricted goods into and from Northern Ireland and is therefore *ultra vires* section 4 (1) of the Irish Free State (Consequential Provisions) Act, 1922.

In *Rex* (*McBirney and Henry*) *v. the Justices of Armagh* (1), the prosecutors were charged with being

(1) [1934] N.I. 212.

K.B.D. 1934.

REX (ALLEN) v. JUSTICES OF COUNTY TYRONE.

knowingly concerned in an attempted evasion of duty by knowingly harbouring three heifers imported from the Irish Free State into Northern Ireland. False statements had been made to the police but no evidence of importation was given. It was held that as there was no evidence that any offence had been committed the justices were wrong in convicting.

The Attorney-General (*A. B. Babington, K.C.*), *Begley, K.C.*, and *Dougherty* for the respondents :—

Section 4 (1) of the Act of 1922 empowered the Commissioners of Excise and Customs to make regulations for the purpose of safeguarding the revenue and preventing and regulating the importation and exportation of prohibited goods and by such regulations to apply to such importation and exportation any of the provisions of the Customs Acts subject to such modifications as might be necessary to adapt them to importation and exportation of goods by land.

The provisions of the Customs Consolidation Act, 1876, formerly were only applied to a sea boundary ; but since the establishment of the Irish Free State it was necessary in order to adapt those provisions to a land boundary to introduce certain modifications. That is the object of the regulation in question.

The regulation is *intra vires*. Similar provisions were made in the Customs Consolidation Act, 1876.

Section 168 of that Act makes it an offence for any person in any matter relating to customs to make any false declaration or, if required by that or any other Act, to answer questions relating to customs put to him by the officers of customs not truly to answer such questions.

Section 132 required the master of a ship on the ship's clearance to answer such questions concerning the ship's cargo and intended voyage as might be demanded of him. And section 147 required him to produce any documents for inspection on demand by a customs officer.

It is not necessary to prove an importation in order to prosecute under the said regulation. The whole

object of such questions is to enable customs officers to determine whether or not the goods have been imported.

Rex (*McBirney and Henry*) *v. Justices of Armagh* (1), was decided under section 259 of the Act of 1876 and has no application to the present case.

Murphy, K.C., (in reply) :—

Section 168 of the Customs Consolidation Act, 1876, only shews that the provisions of that Act requiring persons to make true statements were strictly limited in character and were to be applied solely to cases of importation and exportation.

SIR WILLIAM MOORE L.C.J.

MOORE, L.C.J., delivered the judgment of the Court.

We have listened very carefully to the arguments in this case and we have considered it during the interval.

I think we have to look at what the ordinary law of the land is, apart from statute. First of all, the ordinary law is very jealous of the liberty of the subject. The old proverb that "the Englishman's "house is his castle" illustrates that. The inference is that the liberty of the individual is unrestricted in every way. When a man is charged with an offence for which he is in danger of arrest, or has been arrested, nothing he says is used against him in evidence unless he has been duly cautioned. As I observed during the argument, in the old days the prisoner was not allowed to give evidence, and our system of ordinary common law is to avoid, so far as one can, convicting a man out of his own mouth by statements which may be got from him without due caution and due protection. That is the common law.

Now, the collection of the King's revenues is entirely a matter of statute so far as we are concerned. In the old days the King could impose customs and have them collected, but now the customs duties are collected entirely under statutory provision. The whole system of collection is governed by statute and parliament

(1) [1934] N.I. 212.

K.B.D. 1934.

REX (ALLEN) v. JUSTICES OF COUNTY TYRONE.

SIR WILLIAM MOORE. L.C.J.

itself has been at pains to see, so far as it could, that the statute does not conflict with the common law in so far as interference with the liberty of the subject is concerned further than is necessary.

I take it that the practice of the customs legislation was brought up to date so far as the year 1876 by the Customs Consolidation Act, 1876, to which we have been referred. We have been referred to it in nearly every case. It is a statute containing 290 sections, and it makes provision under statutory powers for the collection of the King's revenues, and in that case his customs officers are given power to interrogate, merely making inquiries for the better collection of the revenues. The statutory power with which we are concerned only applies under sections 132 and 144 of the Customs Act where goods which were dutiable are being brought into the country in ships, and in this connection only was it made, for the first time, a statutory duty on persons interrogated to make a true answer. So far as I am aware—the learned Attorney-General could not refer us to any other section—there is no statutory duty anywhere else on any person to make a true answer to a customs officer other than in these two sections. Of course, in all cases not so provided for, it would be most regrettable if he did not make a true answer, but it is not a statutory offence on his part if he makes a false answer. This has nothing to say to criminal charge of fraud as distinguished from a revenue offence.

Under these sections, it is when a customs officer goes aboard a ship to make an examination that it is a statutory duty upon persons interrogated to make a true answer. That is as far as liberty of the subject is safeguarded because that power itself is limited.

A new situation in Northern Ireland arose in 1921. Here the question of a land frontier arose (see marginal note) but this country had never been faced with the problem of a land frontier. The legislature was confronted for the first time, I believe, with such a frontier within the United Kingdom, and for the purpose of safeguarding the revenue and preventing and regulating the importation of prohibited and

restricted goods, by section 4 of the Irish Free State (Consequential Provisions) Act, 1922, it was provided that the provisions of the Customs Act should apply to any such regulations as to the importation or exportation of goods—I am not using the actual words of the statute—with such modifications as might be necessary to adapt them to the importation or exportation of goods by land. The regulations may prohibit the importation or exportation of all goods or any classes of goods except by certain routes and during certain hours, and also where particular goods shall be passed through from one side of the border to the other. In pursuance of that power given by that section certain regulations were made. The present regulation is one of the Statutory Rules and Orders, 1933, No. 240, and by section 12 (3) "Every person "in charge of any merchandise or of any train or "vehicle who shall stop at a Boundary Post or Customs "Station or on request by an officer shall truly answer "all questions relating to his journey or to any "merchandise or goods conveyed by him as shall be "put to him by an officer."

Then by section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922, it is provided that any breach of these regulations constitutes an offence under the Customs Act.

Accordingly, if this regulation were valid, and if the prosecutor in this matter did make an untrue statement a statutory offence would be committed.

I am dealing with the regulations of the Irish Free State (Consequential Provisions) Act, 1922, section 4, reinforced by subsequent regulations in 1933. I do not think there is any real difference between the two orders. This regulation was made for the purpose of authorising the interrogation of any person in charge of any merchandise by a customs officer—merchandise which was being exported or imported. That does not apply in this case. Here there is no evidence that the goods were being actually imported, or had come from the Free State, but the justices found that the defendant did not truly answer all questions put to him by the customs officer, and was therefore guilty of a statutory offence.

K.B.D. 1934.

REX (ALLEN) v. JUSTICES OF COUNTY TYRONE.

SIR WILLIAM MOORE, L.C.J.

It is argued here that any questions put to such person in charge of goods should be answered irrespective of importation or exportation. Well, the section under which these regulations were made was a section passed for safeguarding the revenue and preventing and regulating the importation or exportation of prohibited or restricted goods. I omit subsequent reference to the provision of the Customs Act, which only apply where that Act creates an offence for untrue answers in two special cases.

It has been suggested that under the present Act any regulations of any sort, however extreme, provided that they would have the effect, or which are made for the purpose, of safeguarding the revenue and preventing the importation or exportation of goods, would be within the competence of the rule-making authority, and in the course of argument the Attorney-General submitted that the Commissioners were given practically unlimited powers in the making of regulations in order to enable them to stop the importation or exportation of goods, including, for example, a power of curfew over the whole of Northern Ireland if it would have that effect.

What we have to decide is whether it is permissible by such regulations to interrogate a man irrespective of importation or exportation, so that a false answer becomes a statutory offence under section 4 (2) of the Act, this being a section to provide for the land frontier. A man may be questioned in connection with importation or exportation with a view to convicting him if he is in possession of cattle which have been brought across the border, but in this case there is no evidence that these cattle were imported at all. In other words, it was not a frontier transaction.

We are both of opinion that such a reading of this regulation so as to include generally cases irrespective of importation goes far beyond the authority given by the section. It is made to prevent the importation of cattle across the border. In this case there is no evidence that these cattle were ever connected with the Free State. The question here is, assuming the right of the customs officer to interrogate the possessor of

any cattle anywhere in Northern Ireland, whether there is any statutory duty or obligation upon the person so interrogated, irrespective of evidence of importation, to make a true answer to the customs officer or to answer at all.

We think the regulation goes beyond the authority given by this section, that it is too general, and that no statutory offence was committed if this man refused to answer or if he answered untruly, and it is not any offence at common law.

I need scarcely add that this decision has nothing to say to the state of affairs under the Finance Act, 1934, passed subsequently, under which the person charged may have to furnish "proof" as therein provided.

We are therefore of opinion that this conviction ought to be quashed, and direct that the conditional order be made absolute, with costs.

Solicitors for the prosecutor: *Shields & Murnaghan.*
Solicitor for the respondents: *James Cooper.*

J. R.

K.B.D. 1935.

Jan. 31.

THE KING (McCAUGHEY) *v.* THE JUSTICES OF COUNTY TYRONE (1).

Customs—Summary Jurisdiction—Jurisdiction of Justices—Whether power in justices to impose unlimited term of imprisonment—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36) *section* 232, 237—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict.*, *c.* 21) *section* 12, *Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *section* 18.

The prosecutor was charged at petty sessions on a summons with being *inter alia* knowingly concerned in a fraudulent evasion of duties of customs in respect to ten head of cattle. He was convicted and was ordered to pay the sum of £300 or in default to be imprisoned until that sum be paid or discharged according to law.

On an application to make absolute a conditional order for a writ of habeas corpus notwithstanding cause shown.

Held, by the King's Bench Division (Moore, L.C.J., and Megaw, J.), that it was necessary for the justices to state the limit of the term of imprisonment imposed, and that as no term was fixed, the order of the justices was bad.

On 23rd June, 1934, the prosecutor, Francis M'Caughey, was charged at Fivemiletown, on a summons, with being knowingly concerned, at Corcloghey, County Tyrone, in a fraudulent evasion of duties of customs in respect of certain uncustomed goods, viz., ten head of cattle, contrary to section 186 of the Customs Consolidation Act, 1876, whereby he had forfeited the penalty of treble the duty paid value of the goods for which the Commissioners of Customs had elected to sue.

He was also charged on a second summons for breach of a Land Boundary Regulation, and on a third summons he was charged for assault on a customs policeman.

He was convicted on all three charges.

On the first summons he was ordered to forfeit and pay the sum of £300 or in default thereof to be imprisoned without hard labour until that sum be paid or be discharged according to law.

(1) In the King's Bench Division before Moore, L.C.J., and Megaw, J.

On the second summons he was fined a sum of 5*s.* 0*d.* or in default imprisonment without hard labour for seven days.

On the third summons he was fined £100 or in default imprisonment for six months without hard labour unless the penalty be sooner paid or be discharged according to law.

An application was made to the King's Bench Division to produce the prosecutor, Francis McCaughey, and to show cause why he should have been detained and should not be released.

The King's Bench Division granted a conditional order on the grounds that the order made by the justices on the first summons was made without and in excess of jurisdiction, that the order was bad on its face, that the order was contrary to natural justice, and that the order was made in contravention of the provisions of section 237 of the Customs Consolidation Act, 1876, as affected by section 12 of the Customs and Inland Revenue Act, 1879, and of section 18 of the Criminal Justice Administration Act, 1914.

Cause having been shown on behalf of the Commissioners of Customs and Excise against the conditional order, an application was made on behalf of the prosecutor to make the order absolute notwithstanding cause shown.

Beattie, K.C. (with him *Copeland*) for the prosecutor :

The conviction cannot stand by reason of the provisions of section 18 of the Criminal Justice Administration Act, 1914. This section was not brought to the attention of the court in *The King* (*Carolan*) *v. Justices of Fermanagh* (1).

Section 232 of the Customs Consolidation Act, 1876, should be read in connection with section 237 of the same Act.

The sentence was imposed by the justices under the belief that the justices had the necessary jurisdiction under section 232.

We maintain that there was no power to inflict a sentence of unlimited imprisonment.

(1) [1934] Unreported.

K.B.D. 1935.

THE KING (McCAUGHEY) v. THE JUSTICES OF COUNTY TYRONE.

In *The King* (*McConville*) *v. Justices of Armagh* (1), it was held that section 12 of the Customs and Inland Revenue Act, 1879 (which provides that any person convicted of an offence against the Customs Acts, and who had been adjudged to pay a penalty of £100 or upwards, may for a first offence be imprisoned for not less than six months nor more than nine months, and for a subsequent offence may in lieu of payment of the penalty be imprisoned with or without hard labour, for not less than six months nor more than twelve months) had been repealed by section 16 of the Criminal Justice Administration Act, 1914.

We submit that if section 16 of the Criminal Justice Administration Act, 1914, impliedly repeals section 12 of the Customs and Inland Revenue Act, 1879, as regards the quality of the imprisonment, on the same principle, section 18 of the Criminal Justice Administration Act, 1914, should be taken to repeal section 12 of the 1879 Act, as regards the quantity of the imprisonment. Taking section 12 of the 1879 Act in conjunction with section 232 of the 1876 Act, we contend there is no power to inflict a sentence of unlimited imprisonment. There is no power to inflict a sentence of imprisonment for life.

The Attorney-General (*A. B. Babington, K.C.*), (with him *J. G. Dougherty*) for the Commissioners of Customs and Excise :—

The point at issue in the present case is the proper construction to be put on section 232 of the Customs Consolidation Act, 1876. That question has already been decided in *The King* (*Carolan*) *v. The Justices of Fermanagh* (2).

We submit that the court is bound in the present case by the decision in *The King* (*Carolan*) *v. Justices of Fermanagh* (2).

Section 12 of the Customs and Inland Revenue Act, 1879, which was substituted for section 237, of the Customs Consolidation Act, 1876, dealt merely with sentences with or without hard labour.

(1) [1934] N.I. 222. (2) [1934] Unreported.

We submit that section 12 was not intended as a repeal of section 232.

There is no difficulty in construing section 232 as it was construed in *The King* (*Carolan*) *v. Justices of Fermanagh* (1).

There is no inconsistency between section 232 and section 237.

Section 18 of the Criminal Justice Administration Act, 1914, only applies where there are consecutive sentences of imprisonment.

The matter comes down to exactly the same point as was decided in *The King* (*Carolan*) *v. Justices of Fermanagh* (1).

The net point is whether section 232 is to be construed by the Form of Conviction contained in Schedule C to the Customs Consolidation Act, 1876 (see *Highmore's Customs Laws*, page 330), or whether it is limited by section 12 of the Act of 1879.

We submit that the view taken by the court in *The King* (*Carolan*) *v. Justices of Fermanagh* (1) was correct. The order made by the justices was right. This order follows exactly the principle laid down in *The King* (*Carolan*) *v. Justices of Fermanagh* (1).

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J. : The prosecutor, Francis McCaughey, was convicted at Petty Sessions.

On the 23rd June, 1934, he was charged at Fivemiletown, County Tyrone, on the following complaints on three summonses. He was first of all charged with being knowingly concerned in a fraudulent evasion of duties of customs in respect of certain uncustomed goods, to wit, ten head of cattle, contrary to section 186 of the Customs Consolidation Act, 1876, whereby he had forfeited the penalty of treble the duty paid value of such goods for which the Commissioners had elected to sue.

It was also charged against him on a second summons that on 10th June, 1934, he being in charge of certain merchandise, to wit, ten head of cattle, did import the same into Northern Ireland from the Irish Free State

(1) [1934] Unreported.

K.B.D. 1935.

THE KING (McCAUGHEY) v. THE JUSTICES OF COUNTY TYRONE.

SIR WILLIAM MOORE, L.C.J.

otherwise than by one of the routes specified in the Schedule to the Regulations contrary to Regulation 12 (1) of Customs (Land Boundary) Regulations and section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922.

On a third summons, he was charged with assaulting Sergeant M. Hughes, R.U.C., he being a person employed for the prevention of smuggling and in the execution of his duty contrary to section 12 (5) of the Customs and Inland Revenue Act, 1881.

Francis McCaughey was convicted of the first offence and was ordered to forfeit and pay the sum of £300 or in default thereof to be imprisoned in His Majesty's prison at Belfast without hard labour until the sum of £300 be paid or discharged according to law.

He was convicted of the second charge and fined a sum of five shillings or in default imprisonment without hard labour for seven days.

He was also convicted on the third charge and fined £100 or in default imprisonment for six months without hard labour unless said penalty of £100 be sooner paid or be discharged according to law.

The unlimited term of imprisonment in the order of the magistrates meant that if McCaughey had not the money to pay the fine he might have to spend the rest of his years in prison.

I must do my best to strive against that possibility because that would mean one law for the rich and another for the poor.

I decline to follow any decision that would have that effect, and if the Court had acted as the Attorney-General suggested they had in Carolan's case, they must have been wrong.

Section 232 of the Customs Consolidation Act, 1876, provides that "if any penalty incurred for any offence "under the Customs Acts be not paid on conviction, "the convicting justice shall forthwith commit the "offender to any of Her Majesty's gaols within his "jurisdiction, there to remain for such term as is "hereinafter provided, or until the penalty shall "be paid."

Section 12 of the Customs and Inland Revenue Act, 1879, (which was substituted for section 237 of the

Customs Consolidation Act, 1876), provides that "when "any verdict shall pass or conviction be had against "any person for any offence against the Customs Acts, "and he shall have been adjudged to pay a penalty "of £100 or upwards, the presiding justice may, if "for a first offence, commit the offender to one of Her "Majesty's prisons for not less than six nor more than "nine months, and if for a subsequent offence may "order that the offender shall, in lieu of payment of "the penalty, be imprisoned, with or without hard "labour, for a period not less than six nor more than "twelve months."

In my opinion, it was necessary for the justices to state the limit of the term of imprisonment imposed, which in the case of a first offence, should be not less than six months nor more than nine months.

I think that, as no term was fixed, the order of the magistrates was bad. The conditional order must be made absolute and the order discharged.

MEGAW, J.

MEGAW, J.: I agree.

The whole matter turns on section 232 of the Customs Consolidation Act, 1876, and section 12 of the Customs and Inland Revenue Act, 1879.

The first section did not provide for any relief, even if the penalty were to be paid.

No term of imprisonment is mentioned except in section 12 of the Customs and Inland Revenue Act, 1879, which, in my judgment in the Court of Appeal in Sherry's case (1), I regarded as putting a restriction on the term of imprisonment which might be imposed.

To my mind, the words "until the penalty shall be "paid" in section 232 of the Customs Consolidation Act, 1876, must be read in the light of the restriction mentioned in section 12 of the Act of 1879 and the words of the section should be construed so far as possible in favour of the liberty of the subject.

Solicitors for the prosecutor: *Joseph Smith & Son.*

Solicitor for the Commissioners of Customs and Excise: *Chief Crown Solicitor.*

(1) [1935] N.I. 211.

J. McC.

C.A.
1935.

Jan. 28, 29.
May 10.

O'NEILL v. MURPHY AND OTHERS (1).
(1934. No. 165.)

Undue Influence—Consideration—Payment by Prayers—Statute of Limitations (16 & 17 *Vict.*, *c.* 113) *section* 20—*Acknowledgment.*

The plaintiff sued for the sum of £1,105 3*s.* 0*d.*, being the balance alleged to be due for work and labour done, moneys expended and services rendered as architect for the defendant, Canon M. and the C. and P. Religious Order, in connection with the planning and erection of buildings at B., in the County of A.

The defendants pleaded: (*a*) an agreement in which it was a term that the Religious Order should perform certain services in the nature of prayers for the benefit of the plaintiff and his family, and that the plaintiff would accept performance of the said services, together with the payment of a sum of £200 in full satisfaction of this portion of his claim; (*b*) that the labour and work were done, the money expended and the services rendered voluntarily and as an act of courtesy by the plaintiff; (*c*) that the plaintiff's claim in so far as it related to all items prior to January 15th, 1928, was barred by the Statute of Limitations.

The defendants also, whilst denying liability, brought into Court the sum of £370 as being sufficient to discharge their liability, if any.

The plaintiff, in his reply, pleaded that if he made the alleged agreement he was induced to do so by the undue influence of his spiritual adviser, the defendant Canon M., and that there was no consideration for this agreement.

In reply to the defence of the Statute of Limitations, the plaintiff relied upon an acknowledgment of his claim in writing signed by the defendants or their agent and by part payment.

In answer to the questions put to them the jury found that the plaintiff was induced to enter into the agreement alleged by the undue influence of Canon M., that the payments made by the defendants M. J. K. and C. G. C. in 1930 and 1932 were not made on foot of the general account of the plaintiff, and that Canon M. acted as agent for the other defendants in all these transactions.

The action was tried before the Lord Chief Justice who abstained from directing any judgment to be entered on the findings of the jury.

Both the plaintiff and the defendant applied by motions for judgment or a new trial.

Held, by the Court of Appeal (Andrews and Best, L.JJ.):—

(*a*) that the finding of the jury of undue influence on the part of Canon M. could not be interfered with;

(1) In the Court of Appeal before Andrews and Best, L.JJ.

(*b*) that there was evidence to support the finding of the jury that the payments made by the defendants M. J. K. and C. G. C. in 1930 and 1932 were not made on foot of the general account of the plaintiff;

(*c*) that the plaintiff's claim was not saved from the operation of the Statute of Limitations by an acknowledgment in writing;

(*d*) that the plaintiff, in order to avail himself of the submission that the undue influence prevented the Statute of Limitations running against him, must prove that such undue influence continued to within six years before action brought; and that if he intended to rely on such point, it was for him to obtain a finding from the jury to that effect.

Held, by Andrews, L.J., that there was no sufficient consideration in law for the agreement.

MOTION for Judgment or a New Trial.

The plaintiff sued in an action for the sum of £1,105 3*s*. 0*d*., being the balance alleged to be due to him for work and labour done, moneys expended, and services rendered by him as an architect for and at the request of the defendant, the Very Reverend Bernard Canon Murphy, and the Cross and Passion Religious Order, in connection with the planning and erection of buildings at Ballycastle, County Antrim.

There were two other defendants, the Reverend Mother Mary J. Kane, Mother General of the Cross and Passion Order, who resided at Bolton, and the Reverend Mother Catherine G. Conlan, Mother Superior of the Cross and Passion Order at Ballycastle.

The defendant Bernard Canon Murphy died before the trial of the action and representation not having been taken out to him, the action proceeded against the two remaining defendants as representing the Cross and Passion Religious Order.

The plaintiff's claim was divided into four parts. The first part was for £30, fees claimed in respect of the preparation of plans, specification and estimate, and the obtaining of a tender in or about the year 1916. The work in respect of which these plans were prepared was the renovation of an old convent for nuns who belonged to the Order. The work was never carried out, and the fees charged were, accordingly, at half the usual rate.

C.A. 1935.

O'NEILL v. MURPHY AND OTHERS.

The second part of the claim was for £1,185 5*s.* 0*d.*, fees in respect of the erection and completion of the new convent at Ballycastle, for which a man called Taggart was contractor. The work was commenced in 1923 and finished in 1926.

Between the years 1929 and 1931 a new wing was added to the convent by a contractor names James McDonnell, in respect of which the plaintiff claimed fees amounting to £307 5*s.* 0*d.*

McDonnell had a further contract in the year 1932 for the erection of a new laboratory and domestic science room, in respect of which plaintiff's fees amounted to £162 13*s.* 0*d.*

In their defence the defendants admitted that the plaintiff did the work and rendered the services alleged.

As to the second portion of the claim, amounting to £1,185 5*s.* 0*d.*, they alleged payment to the plaintiff between February, 1920, and October, 1924, of sums amounting to £250 ; further, they pleaded an agreement contained in letters interchanged in September, 1926, by which the Religious Order agreed that they would perform certain services in the nature of prayers for the benefit of the plaintiff and his family, and that the plaintiff would accept performance of these services, together with a further sum of £200 in full satisfaction of this portion of his claim.

The defendants also contended that such services had been rendered and that the sum of £200 had been paid and accepted.

In answer to the first and second portions of the claim, amounting to £1,215 5*s.* 0*d.*, they relied upon the Statute of Limitations.

As to the first, third and fourth portions of the claim, amounting to £499 18*s.* 0*d.*, the defendants pleaded payment to the plaintiff of the sum of £150 on account, leaving a balance of £349 18*s.* 0*d.* due in respect of these portions of the claim, which sum they alleged was tendered to the plaintiff on 13th October, 1933. This plea of tender was abandoned in defendant's answer to plaintiff's notice for particulars in which they stated that they would consent to have the plea struck out at the hearing.

In answer to the whole action, the defendants, whilst denying liability, lodged the sum of £370 in Court.

In his reply, the plaintiff, in addition to joining issue, pleaded that, if the plaintiff made the alleged agreement, he was induced to do so by the undue influence of his spiritual adviser, Canon Murphy; he averred that there was no consideration for the agreement; and, as an answer to the plea of the Statute of Limitations he pleaded an acknowledgment in writing and part payment.

In the particulars of the undue influence and acknowledgment he relied upon, the plaintiff stated that at the time of the alleged agreement and for many years previous, the relationship between Canon Murphy and himself was that of spiritual adviser and devotee, and that the undue influence arose from such relationship, in the course of which, he alleged, that Canon Murphy acquired an ascendancy and power over his mind, and that in consequence he was not a free agent.

The plaintiff relied upon Canon Murphy's letter to the plaintiff's solicitor of 10th November, 1933, and upon paragraph 8 of the defence as constituting the acknowledgment on which he relied.

In this letter Canon Murphy said: "I am prepared "to pay every penny demanded, less the balance on "Taggart's contract, after allowing for the £450 paid "and acknowledged on same. . . . It is his letter "of the 14th September, 1926, that prevents me "paying him in full. . . . I can therefore only "pay Mr. O'Neill when he on oath convinces the Judge "and myself that when he wrote the above letter and "accepted the nun's little present of £200 as a small "recognition of his then generous gesture, he did not "believe a word of it, and was deliberately deceiving "the nuns and myself, and many, many others to "whom I read his letter."

In paragraph 8 of the defence the defendants pleaded that as to that portion of the plaintiff's claim consisting of items amounting to £499 18*s.* 0*d.*, the defendants paid to the plaintiff the sum of £150 on account of that portion of the claim, leaving a balance

C.A. 1935.

O'Neill v. Murphy and Others.

of £349 18*s.* 0*d.* due in respect of same. In this paragraph they also pleaded that the defendant, Canon Murphy for and on behalf of himself and the other defendants, on the 13th October, 1933, tendered to the plaintiff the sum of £349 18*s.* 0*d.* which the plaintiff then refused to accept and the defendants now bring the same into Court. The plea of tender was by consent withdrawn.

At the trial which took place before the Lord Chief Justice and a special jury of the City of Belfast, three questions were submitted to the jury. These questions with their answers were as follows :—

(*a*) Was the plaintiff induced to enter into the agreement alleged in paragraph 2 of the defence by the undue influence of Canon Murphy ? Answer : Yes.

(*b*) Were the payments made by the defendants, Mary J. Kane and Catherine G. Conlan, in 1930 and 1932, on foot of the general account of the plaintiff ? Answer : No.

(*c*) Did Canon Murphy act as agent for the other defendants in all these transactions ? Answer : Yes.

Both sides asked for judgment but the Lord Chief Justice abstained from directing any judgment to be entered, giving the parties liberty to apply as they might be advised.

The plaintiff moved for judgment for the full amount of his claim, or, alternatively, for a new trial on the second question submitted to the jury, whilst the defendants, the Reverend Mother Mary J. Kane, and the Reverend Mother Catherine G. Conlan, applied by cross motion for judgment.

E. S. Murphy, K.C., Lowry, K.C., and *MacDermott* for the plaintiff :—

The amount claimed is legally due, but Canon Murphy says that he is prevented from paying what is legally due. There is evidence of the most potent character of the complete domination exercised by Canon Murphy over the plaintiff. There is evidence

that Canon Murphy dictated to the plaintiff the greater portion of the plaintiff's letter of 14th September, 1926.

We submit that there was evidence of undue influence and no evidence contra. There was abundant evidence to justify the Lord Chief Justice in leaving the question of undue influence to the jury.

We submit that prayers do not constitute a sufficient consideration in law for the agreement.

Canon Murphy's letter of 10th November, 1933, amounts to an acknowledgement sufficient to take the claim for fees in respect of the contract for the erection and completion of the new convent, out of the Statute of Limitations.

We also contend that paragraph 8 of the defence amounts to such an acknowledgment.

We submit that it cannot be seriously argued that a spiritual obligation to two deceased persons is to be regarded as preventing a debt legally due from being paid.

In re Caus, Lindeboom v. Camille (1), and *Bourne v. Keane* (2), have nothing to say to the present case.

Prayers are not a legal satisfaction.

On the question of undue influence we rely on *Hatch v. Hatch* (3).

In the present case there is the actual specific evidence of undue influence. This is as clear a case of spiritual adviser and devotee as could be imagined. The onus is on the defendant of disproving undue influence.

We submit that the jury's finding that the plaintiff was induced to enter into the agreement by the undue influence cannot and ought not to be set aside.

We submit that irrespective of the jury's second finding the plaintiff is entitled to judgment on the ground that Canon Murphy's letter of 10th November, 1933, amounts to an acknowledgment sufficient to take the claim for fees on the contract for the new convent out of the Statute of Limitations, and on the further ground that paragraph 8 of the defence amounts to such an acknowledgment.

(1) [1934] Ch. 162.
(2) [1919] A.C. 815.
(3) 9 Ves. 292.

C.A. 1935.

O'Neill v. Murphy and Others.

We submit that the Lord Chief Justice misconceived the nature of undue influence. He treated it as something in the nature of hypnotism. The evidence establishes that plaintiff's will was overborne by Canon Murphy's will.

On the point arising under the Statute of Limitations we rely on the words used by Lord Westbury in *McCormick v. Grogan* (1), where he said, "The Court "of Equity has from a very early period, decided that "even an Act of Parliament shall not be used as an "instrument of fraud; and if in the machinery of "perpetrating a fraud an Act of Parliament intervenes, "the Court of Equity, it is true, does not set aside the "Act of Parliament, but it fastens on the individual "who gets a title under that Act, and imposes upon "him a personal obligation, because he applies the Act "as an instrument for accomplishing a fraud."

In *Halsbury, the Laws of England*, volume 13, page 75, par. 83, the law is stated in these words, "Equity does "not allow a statute to be made an instrument of "fraud. Under the Statute of Frauds trusts of lands "can be created only in writing, and under the Wills "Act, 1837, all testamentary dispositions must be in "writing. Thus a person who takes real estate by "instrument *inter vivos*, or real or personal estate upon "an intestacy or under a will, and in either case in "pursuance of a parol arrangement, of which he was "cognisant, that the property should be held by him "upon trust, is not allowed to use the statute as a "means of avoiding the performance of the trust. "A Court of Equity does not set aside the statute, "but it fastens on the individual who gets a title "under it, and imposes on him a personal obligation "because he applies the statute as an instrument for "accomplishing a fraud."

The Statute of Frauds is no more cogent in its terms than the Statute of Limitations.

We submit that there is an absolute analogy between the Statute of Frauds and the Statute of Limitations and the same principle should apply.

(1) L.R. 4 H.L. 82, 97.

McGonigal, K.C., and *Beattie, K.C.* (with them *McSparran*) for the defendants :—

It cannot be alleged that there is any evidence of undue influence continuing beyond the date of the agreement. No decided case has been referred to resembling the present case. It is not suggested that plaintiff was mentally weak. The plaintiff ought to be bound by his pleadings. There is no plea that the undue influence continued after the date of the agreement. Nor is there any mention of the alleged undue influence continuing after the date of the agreement, in plaintiff's notice of motion to the Court of Appeal.

We submit that the finding of undue influence is one which no reasonable man could come to.

In *The Annual Practice*, 1935, page 722, it is stated that " there is no evidence to go to the jury if the " evidence was such that no jury could reasonably " find a verdict."

The proper principle was laid down in *Metropolitan Railway Co. v. Wright* (1), where it was held that a new trial ought not to be granted on the ground that the verdict of the jury was against the weight of the evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find.

No jury acting reasonably could have arrived at this finding of undue influence in the present case. There is not a scintilla of evidence to show that the plaintiff was a devotee of Canon Murphy.

We rely on the words used by The Master of the Rolls in *Fowler v. Wyatt* (2), where he said, " where you " have two gentlemen actively engaged in business, " both competent to carry on an active and thriving " business, it requires very strong evidence to explain " how it is that the one should have obtained this " peculiar influence over the mind of the other."

It was impossible for twelve reasonable men to have found that the plaintiff was induced to enter into the agreement by the undue influence of Canon Murphy. The jury cannot have really appreciated the meaning of undue influence.

(1) 11 A.C. 152. (2) 24 Beav. 232, 238.

CA. 1935.

O'NEILL v. MURPHY AND OTHERS.

Blackburn, J., said in his judgment in *Bolton v. Madden* (1), "the adequacy of the consideration is for "the parties to consider at the time of making the "agreement, not for the Court when it is sought to be "enforced."

If there is no consideration there is no obligation created, and the Statute of Limitations is a complete answer.

Canon Murphy's letter of 10th November, 1933, was a most strenuous denial of liability and a refusal to pay.

An acknowledgment to be binding must be made before action brought.

It is stated in *Halsbury*, volume 19, paragraph 115 that "payment into Court by a debtor in an action by "the creditor is not sufficient to take the rest of the "debt out of the statute; it is equivalent to saying "that the amount paid in is due and no more; it is also "ineffectual for the same reason as an acknowledgment "made after action brought."

We rely on *Long v. Greville* (2), which was an action of assumpsit for goods sold and delivered and on the money counts. The pleas were, general issue, and the Statute of Limitations. The defendant paid money into Court generally. It was held that such payment did not take the case out of the statute.

In *Reid v. Dickons* (3), it was held that payment of money into Court on a count on a promissory note payable by instalments, is only an admission by the defendant that money to the amount paid in was due on the promissory note: it does not bar the Statute of Limitations as to a further sum claimed to be due on the same note.

It is elementary law that the acknowledgment must precede the action. The jury were quite entitled to find that this was not a case of a running account.

Independent legal advice is not necessary in all cases, *Inche Noriah v. Shaik Allie Bin Omar* (4).

It is for the plaintiff to show that the undue influence continued. The ordinary rule is he who affirms must prove.

(1) L.R. 9 Q.B. 55, 57.
(2) 3 B. & C. 10.
(3) 5 B. & Ad. 499.
(4) [1929] A.C. 127.

We rely on the words used by Horridge, J., in *Oelkers v. Ellis* (1), when dealing with the plea of the Statute of Limitations.

In the present case the plaintiff lay by for more than six years.

Roche v. O'Brien (2) is a convincing case to show that the onus is on the plaintiff to show that he was ignorant of his rights and also to explain why he had not brought his action several years previously.

The authorities cited on behalf of the plaintiff are clearly in the defendant's favour.

A promise can be accepted as good consideration. The saying of prayers is a legal consideration recognised by the common law.

So long as the agreement stands it is a perfect answer to the action.

We submit that there is nothing in the evidence to show that the relationship between Canon Murphy and the plaintiff was that of spiritual adviser and devotee. There is no evidence of domination of will and mind. There was no suggestion of undue influence before 1934.

We submit that we are entitled to judgment.

[They also referred to *Allcard v. Skinner* (3), *Hugenin v. Baseley* (4), *Haigh v. Brooks* (5), *Smith v. Smith* (6), *Begbie v. The Phosphate Sewage Co.* (7), *Cook v. Field* (8), *Attorney-General v. Delaney* (9), *O'Hanlon v. Logue* (10), *Bourne v. Keane* (11), *Morris v. Baron & Co.* (12), *Evans v. Powis* (13), *In re River Steamer Company Mitchell's Claim* (14) *Corry, Brothers & Co. v. Owners of Turkish Steamship "Mecca"* (15), *Blennerhassett v. Day* (16), *Hatch v. Hatch* (17).]

(1) [1914] 2 K.B. 139, 151.
(2) 1 Ball & Beatty, 330.
(3) 36 Ch. D. 145.
(4) 1 W. & T.L.C. 203.
(5) 10 Ad. & E. 309.
(6) 32 L.J.C.P. 149.
(7) 44 L.J.Q.B. 233.
(8) 15 Q.B. 460.
(9) I.R. 10 C.L. 104.
(10) [1906] 1 I.R. 247.
(11) [1919] A.C. 815.
(12) [1918] A.C. 1.
(13) 1 Ex. 601.
(14) 6 Ch. App. 822.
(15) [1897] A.C. 286.
(16) 2 Ball & Beatty 104.
(17) 9 Ves. 292.

C.A. 1935.

O'NEILL v. MURPHY AND OTHERS.

Murphy, K.C. (in reply):—

The letter dictated by Canon Murphy speaks eloquently for itself. The plaintiff was to get all this commendation from the nuns by means of a letter to Canon Murphy. Canon Murphy was treating the plaintiff as a mere puppet.

The plaintiff's evidence and his letter to Canon Murphy contain evidence of undue influence on which any jury is entitled to act. There is evidence that part of the letter of September 14th, 1926, was actually dictated to the plaintiff by Canon Murphy. Canon Murphy had established a spiritual ascendancy over the plaintiff. The priest unduly influenced the architect.

There is no case that decides that the saying of prayers amounts to legal consideration of any sort or kind.

Neither *Attorney-General v. Delaney* (1), nor *O'Hanlon v. Logue* (2), have anything to say to the present case.

We submit that there is a difference in essence between the offering up of masses and the saying of prayers by a community.

We submit that Canon Murphy's letter of 10th November, 1933, amounts to an acknowledgment sufficient to take the case out of the Statute of Limitations. This letter is a recognition and admission that the full sum claimed by the plaintiff is legally due. It amounts to an acknowledgment from which the law would assume a promise to pay.

We submit that once the existence of undue influence is established the onus is not on the plaintiff to show that he was emancipated from that undue influence.

The decision in *Corry Brothers & Co. v. Owners of Turkish Steamer "Mecca." The "Mecca"* (3) does not support the defendants' contention in the present case. *Cur. adv. vult.*

ANDREWS, L.J.

May 10.

ANDREWS, L.J.: In this action the plaintiff sued for the sum of £1,105 3*s.* 0*d.*, being the balance alleged to

(1) I.R. 10 C.L. 104.
(2) [1906] 1 I.R. 247.
(3) [1897] A.C. 286.

be due to him for work and labour done, moneys expended, and services rendered by the plaintiff as an architect for and at the request of the defendant, the Very Reverend Bernard Canon Murphy, and the religious order known as The Cross and Passion Order, in connection with the planning and erection of buildings at Ballycastle. The defendant, the Reverend Mother Mary J. Kane, who is Mother General of the Cross and Passion Order, resides at Bolton, and the defendant, the Reverend Mother Catherine G. Conlan, is the Mother Superior of the Cross and Passion Order at Ballycastle.

The claim naturally divides itself into four parts. The first is for £30, fees claimed in respect of the preparation of plans, specification and estimate, and the obtaining of a tender in or about the year 1916. The work in respect of which these plans were prepared was the renovation of an old convent for nuns who belonged to the Order. The proposed work was never carried out, and the fees charged were, accordingly, at half the usual rate. No payment appears to have been made specifically on account of this liability.

The second part of the claim relates to the sum of £1,185 5*s.* 0*d.*, fees claimed in respect of the erection and completion of the new Convent at Ballycastle, for which a man called Taggart was contractor. The work was commenced in 1923, and was not finished until 1926.

Between the years 1929 and 1931 a new wing was added to the Convent by a contractor named James McDonnell, in respect of which the plaintiff alleged that his fees amounted to £307 5*s.* 0*d.* Lastly, McDonnell had a further contract in the year 1932 for the erection of a new laboratory and domestic science room, in respect of which plaintiff's fees amounted to £162 13*s.* 0*d.*

In their defence the defendants admitted that the plaintiff did the work and rendered the services alleged. As to the second portion of the claim, amounting to £1,185 5*s.* 0*d.*, they allege payment to the plaintiff between February, 1920, and October, 1924, of sums amounting to £250 ; and further pleaded an agreement

C.A. 1935.

O'Neill v. Murphy and Others.

Andrews, L.J.

contained in letters interchanged in September, 1926, by which the said religious order agreed that they would perform certain services in the nature of prayers for the benefit of the plaintiff and his family, and that the plaintiff would accept performance of the said services together with a further sum of £200 in full satisfaction of this portion of his claim. They further alleged that such services had been rendered by the defendants, and that the sum of £200 had been paid and accepted. In answer to the first and second portions of the claim, amounting to £1,215 5*s*. 0*d*., they also relied upon the Statute of Limitations. As to the first, third and fourth portions of the claim, amounting to £499 18*s*. 0*d*,. the defendants pleaded payment to the plaintiff of the sum of £150 on account, leaving a balance of £349 18*s*. 0*d*. due in respect of same, which sum they alleged was tendered to the plaintiff on 13th October, 1933. This plea of tender was abandoned in defendant's answer to plaintiff's notice for particulars, in which they intimated that they would consent to have same struck out at the hearing. Finally, in answer to the whole action, the defendants, whilst denying liability, brought the sum of £370 into Court.

In his reply, the plaintiff, in addition to joining issue, pleaded that, if the plaintiff made the agreement alleged, he was induced to do so by the undue influence of his spiritual adviser, the defendant Canon Murphy ; he averred that there was no consideration for the alleged agreement ; and as an answer to the plea of the Statute of Limitations he pleaded an acknowledgment in writing and by part payment.

When the defendants sought particulars of the undue influence and acknowledgment relied upon, the plaintiff answered, first, that at the time of the agreement and for many years prior thereto the relationship between the defendant Canon Murphy and the plaintiff was that of spiritual adviser and devotee ; and that the undue influence arose from such relationship, in the course of which the said defendant acquired, as was alleged, an ascendancy and power over the mind of the plaintiff who in consequence was not a free agent. Secondly, the plaintiff relied upon Canon Murphy's letter to the

plaintiff's Solicitor of 10th November, 1933, and upon paragraph 8 of the defence as constituting the acknowledgment relied upon.

At the trial, which took place before the Lord Chief Justice and a special jury of the City of Belfast, three questions were submitted to the jury. These questions with their answers were as follows :—

(1) Was the plaintiff induced to enter into the agreement alleged in paragraph 2 of the defence by the undue influence of the Very Rev. Bernard Canon Murphy ? Answer : Yes.

(2) Were the payments made by the defendants Mary J. Kane and Catherine G. Conlan in 1930 and 1932 on foot of the general account of the plaintiff ? Answer : No.

(3) Did Canon Murphy act as agent for the other defendants in all these transactions ? Answer : Yes.

Counsel on both sides asked for judgment, but the learned judge abstained from directing any judgment to be entered, giving the parties liberty to apply as they might be advised. The plaintiff, accordingly, now moves this Court for judgment for the full amount of his claim, or, alternatively, for a new trial on the second question submitted to the jury, whilst the defendants, Reverend Mother Kane and Reverend Mother Conlan, apply by cross-motion for judgment.

The grounds relied upon by the parties in support of their applications were the subject of numerous requisitions which were made by counsel at the trial. The defendants' submissions may be summarized as follows :—

(1) There was sufficient consideration in law for the alleged agreement.

(2) That there was no evidence proper to be submitted to the jury of undue influence on the part of Canon Murphy, or that he was agent for the Reverend Mothers.

(3) The letter of 10th November, 1933, does not amount to an acknowledgment sufficient to take the claim for fees on the Taggart contract out of the Statute of Limitations.

C.A. 1935.

O'Neill v. Murphy and Others.

Andrews, L.J.

(4) That paragraph 8 of the defence does not amount to such an acknowledgment. And

(5) That the payments made in 1930 and 1932 were made to specific accounts and were not part payments on foot of fees due on a general account which included the Taggart contract; and that they were, accordingly, not such as to take the plaintiff's claim out of the Statute.

These submissions were all challenged by the plaintiff's counsel, who took exception to the learned judge's charge in so far as they alleged that it conflicted with their contentions.

I have given the case in its various phases much anxious thought both upon its facts and upon the important legal issues involved. I shall deal with the several points in order.

In the first place the defendants have not satisfied me that the consideration relied upon in support of the alleged agreement is sufficient in law for that purpose. At the time that the plaintiff wrote the letter of 14th September, 1926, to Father Murphy, a sum of £935 5*s*. 0*d*, was due to him. In that letter he said :— "Now I think I will be well paid for anything I did if "you can arrange with the Mother General to have "daily prayers offered up for myself and family "together with Mrs. O'Neill and my brother J. K." To this the Reverend Mothers replied on 18th September :—"The remuneration you ask for your gigantic "work is indeed freely given. Daily prayers will be "offered in every house of the Order for your intentions "as a most generous benefactor." A cheque for £200 was enclosed, which the plaintiff was asked to accept as a little favour and as a very small appreciation of the plaintiff's great work and generosity.

Now it is elementary law, which comes down to us from the Roman jurists, that to constitute an enforceable contract not under seal, there must be a good and valid consideration; and, whilst it is clear that Courts will not interfere with the exercise of free will and judgment of the parties by inquiring into the adequacy of consideration, it is necessary that it should be sufficient in law. Thus, neither a mere voluntary

courtesy nor some act already executed will suffice. So, too, a promise by a creditor to accept less than the full amount of his undisputed debt is not legally binding upon him. Such promise cannot be relied upon as a legal satisfaction, for there is no consideration for the relinquishment of the balance of the debt. *Cumber v. Wane* (1), and *Pinnel's case* (2), are landmarks which are too firmly fixed in our law to be shaken ; and, whilst it is true that the addition of some benefit or even of a legal possibility of benefit to a creditor will render the consideration sufficient to support an agreement, such benefit must, as pointed out by Lord Selborne in *Foakes v. Beer* (3), be an independent benefit of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

Now, whilst expressly disclaiming any opinion which might be construed as in the slightest degree derogatory of the real value and efficacy of prayer, I can only say that no case cited to us or which I have found, can properly be relied upon as an authority for the proposition that a mere promise by one person to say prayers or to cause prayers to be said for another amounts in law to a good and valuable consideration for a contract not under seal. If such be the law it should be laid down by our highest judicial tribunal—the House of Lords.

If I am wrong in this view the next question to arise would be whether the agreement relied upon by the defendants was procured by the undue influence of Canon Murphy. The principal cases bearing upon this question will be found in the notes to *Huguenin v. Baseley* (4). The question of onus of proof of undue influence was vigorously contested before us. The answer to the question does not depend in my opinion upon the mere form of a pleading. It rests in my judgment upon whether there existed any such special relationship between the parties that undue influence should be presumed. If a relation of confidence is

(1) 1 Sm. L.C. (13th edition) 373.
(2) 5 Co. Rep. 117 (*a*).
(3) 9 A.C. 605, 614.
(4) 1 White & Tudor L.C. (9th Edition) 203.

C.A. 1935.

O'Neill v. Murphy and Others.

Andrews, L.J.

shown to exist, or is presumed from the position of the parties, then, on grounds of public policy, the law presumes that the gift was not a free one, but that it was the effect of influence induced by these relations, and the burden of disproof of undue influence, *i.e.*, the burden of supporting the gift, is thrown upon the donee. If no such relationship existed the onus falls to be discharged by the donor.

The Courts have declined to give any exhaustive enumeration of the description of persons who fall within such a special relationship, *i.e.*, a relationship in which dominion may be exercised by one person over another. One of the most common instances of such relationship is that of child and parent, or persons standing in *loco parentis ;* another is that of husband and wife ; a third is that of trustee and *cestui que* trust. Yet another, and that is the one relied upon in the present case, is in cases in which religious influence exists. As Lindley, L.J., said in *Allcard v. Skinner* (1) ;—" The equitable doctrine of undue influence " (in gifts ' *inter vivos* ') has grown out of and been " developed by the necessity of grappling with " insidious forms of spiritual tyranny and with " the infinite varieties of fraud." A few lines further on in his judgment the same learned judge continues :— " The influence of one mind over another is very subtle, " and of all influences religious influence is the most " dangerous and the most powerful, and to counteract " it Courts of Equity have gone very far. They have " not shrunk from setting aside gifts made to persons " in a position to exercise undue influence over the " donors, although there has been no proof of the " actual exercise of such influence ; and the Courts have " done this on the avowed ground of the necessity of " going this length in order to protect persons from the " exercise of such influence under circumstances which " render proof of it impossible. The Courts have " required proof of its non-exercise, and, failing that " proof, have set aside gifts otherwise unimpeachable."

Now the present case presents many features of an unusual and difficult character. On the one hand,

(1) 36 Ch D. 145, 183.

there is no evidence that the plaintiff ever went to Canon Murphy for confession or for the sacraments of the Church, or that he ever received religious instruction from him. He lived not in Canon Murphy's parish but in the adjoining parish. Furthermore, the plaintiff was, at the time that the undue influence is alleged to have been exercised, a business man in the prime of life, and in full possession of his faculties, and he admitted that when he wrote the letter of 14th September, 1926, upon which the defendants rely, he knew that he was giving up his fees. It is also to be remembered that, in consequence of the plaintiff's delay in instituting proceedings, the defendants were prejudiced in their defence by being deprived of the evidence of Canon Murphy who died a short time after the issue of the writ. Furthermore, no allegation of undue influence was made, at least in writing, until the pleadings in the action. These were circumstances which it was the duty of the jury to take carefully into consideration before they found that undue influence had been established. On the other hand, they had the plaintiff's evidence that he had met Canon Murphy twenty years before in Ballinalea, where he was Parish Priest ; that Canon Murphy told him on many occasions he would get all sorts of spiritual benefits from the work, and from the masses and prayers which would be said for him ; that he had had spiritual conversations with Canon Murphy who had said that he would be repaid well over ; that, metaphorically speaking, Canon Murphy had held a stick over his head ; that he understood by it all that he would not get spiritual benefits if he could not fall in with all that Canon Murphy wanted him to do, and that he believed he would get benefit from the prayers of the nuns. Finally, there was the important evidence, which it was for the jury to accept or reject, that Canon Murphy had actually dictated to the plaintiff the major portion of the plaintiff's letter of 14th September, 1926.

The jury evidently considered the question a difficult one, for, after an absence of an hour, they returned to Court with the question of undue influence left un-

C.A. 1935.

O'NEILL v. MURPHY AND OTHERS.

ANDREWS, L.J.

answered. Thereupon, the Lord Chief Justice addressed them further upon the question: and, after the lapse of a further twenty minutes, they answered the question of undue influence affirmatively. Personally I feel that if I had been one of the jury I would probably have experienced something of their difficulty, for the circumstances were exceptional. The Lord Chief Justice has reported to us that in his opinion tbe finding upon this question is against the weight of evidence. At the same time he says that he felt that it was not in his power to wholly withdraw the issue from the jury.

What is our duty in the circumstances? It cannot be suggested that the jury were perverse, for they found the next question upon the Statute of Limitations against the plaintiff. It cannot be said that they acted with undue haste. It cannot be said that they did not thoroughly understand the question upon which they were twice charged by the learned judge. From the resumé of the facts which I have set out above it cannot in my opinion be said that there is not evidence to support their answer. Undue influence is a form of fraud, and fraud is essentially a question for a jury if there is any evidence to support it. In these circumstances I feel that we would be acting contrary to authority if we were to interfere with the finding of the jury, though I doubt very much if upon the evidence I would have arrived at the same finding.

This brings me to the defence of the Statute of Limitations. Here, as I have already indicated, the jury found in the defendants' favour that the payments made in 1930 and 1932 were not made on a general account. Although this finding is challenged as being against evidence and the weight of evidence, it is in my opinion the only finding at which the jury could properly arrive on the evidence of the entries in the plaintiff's own books. The fees for work done in respect of the four parts of the plaintiff's claim to which I have already referred are there set out separately; and it is even more important that the several payments made are appropriated to the various contract works in respect of which they were made.

Thus, we find the payments amounting to £450 credited against the fees amounting to £1,150 claimed in the plaintiff's books in respect of the Taggart contract, leaving £700 due. The fact that these sums of £1,150 gross and £700 net were ultimately found to be incorrect—each being £35 5*s.* 0*d.* below the proper figure—does not in the slightest affect the question which I am considering upon the Statute of Limitations. Next, the first McDonnell's contract gives rise to a claim for £307 5*s.* 0*d.*, and in respect of it £50 is stated to have been received on account on 29th July, 1930, and £30 on 1st November, 1930, a total of £80, leaving a balance due, as set out in the extension column, of £227 5*s.* 0*d.* Finally, the claim in respect of the second McDonnell contract is £162 13*s.* 0*d.*, and, as against this, there is specifically credited the payment of £50 made upon 6th March, 1932, leaving a net sum claimed for fees upon this latter contract work of £112 13*s.* 0*d.* The plaintiff was cross-examined upon these entries in his account books but was naturally quite unable to explain away the entries which he had himself made, and, indeed, he re-affirmed what was already quite clear that the contract in 1929 (*i.e.*, the first McDonnell contract) was quite distinct from the previous contract. On this evidence the jury properly found that the payments made in 1930 and 1932 were not made on foot of a general account. How could the jury have held that they were made on account even in part of a contract which both parties at the time the payments were made regarded as being satisfied and discharged ?

This brings me to the question of whether the plaintiff's claim is saved from the operation of the Statute by an acknowledgment in writing. For this purpose Mr. Murphy in his opening argument relied upon Canon Murphy's letter of 10th November, 1933, and upon paragraph 8 of the defence, both of which had been referred to in plaintiff's answer to the defendant's notice for particulars. In his argument in reply he accepted Mr. McGonigal's contention, for which *Bateman v. Pinder* (1), is a conclusive authority, that an acknowledgment to be within the Statute must

(1) 3 Q.B. 574.

C.A. 1935.

O'Neill v. Murphy and Others.

Andrews, L.J.

have been in existence prior to the institution of proceedings. He, accordingly, abandoned the contention that paragraph 8 amounted to an "acknowledgment," and substituted for it the argument that it was to be regarded as an admission that the £130 was paid on a general account, which should be binding upon the defendants. I refuse to so bind them. It conflicts with the stronger admissions to the contrary effect contained in the plaintiff's books to which I have already referred. Further, the sole object of the plea was to set up tender which was abandoned. Finally, it would be manifestly unjust to rely upon this plea for the purpose of making the defendants liable for fees in respect of the Taggart contract, as it was expressly limited to the portions of the plaintiff's claim which excluded the Taggart contract work.

Before passing to Canon Murphy's letter of 10th November, 1933, it is necessary to consider very briefly the well-settled law relating to the sufficiency of written acknowledgments. I borrow from authoritative judgments upon the subject when I briefly summarize that law as follows. To take a case out of the Statute an acknowledgment must comply with one or other of three requirements. There must be either (1) An absolute unconditional acknowledgment of the debt, nothing being said about payment, from which a promise to pay should be implied ; or (2) An express unconditional promise to pay on request ; or (3) A conditional promise to pay upon some event which is proved to have happened. A mere acknowledgment or admission of the existence of a debt will be insufficient if the debtor states either that he will not pay or that he will pay only upon a condition which remains unfulfilled, or at a time which has not elapsed. Further, a mere hope to be able to pay is not a promise to pay at all, for the hope may never be realised.

When these tests are applied to Canon Murphy's letter of 10th November, 1933, it appears to me to satisfy none of them. It was written in reply to the letter of plaintiff's solicitor of 9th November, 1933, demanding payment of £1,105 3*s*. 0*d*., the balance of account for architect's fees, *i.e.*, the entire sum now

sued for. What Canon Murphy said was this: "I am "prepared to pay every penny demanded less the "balance on Taggart's contract, after allowing for the "£450 paid and acknowledged on same. . . . It "is his letter of the 14th September, 1926, that "prevents me paying him in full. . . . I can "therefore only pay Mr. O'Neill when he on oath "convinces the judge and myself that when he wrote "the above letter and accepted the nuns' little present "of £200 as a small recognition of his *then* generous "gesture, he did not believe a word of it, and was "deliberately deceiving the nuns and myself, and "*many many* others to whom I read this letter."

Here is a letter in which, as plaintiff's reply of 25th November clearly recognises, the acknowledgment of the debt is accompanied by a definite refusal to pay the amount claimed upon the Taggart contract. The reason for his refusal is assigned. It is impossible in such circumstances to imply an unconditional promise to pay the amount claimed on foot of that contract; and, if it be contended that the concluding words of my quotation from the letter amount to a conditional promise to pay, it is sufficient to say that the condition never was and never could now be complied with.

One further point remains. It is urged by Mr. Murphy that the Statute of Limitations does not apply because of the existence of undue influence found by the jury. His argument is based on the analogy of the law relating to concealed fraud, and he also relied upon a passage in *Darby & Bosanquet* on the Statute of Limitations, 2nd Edit. 261, where it is said that even in cases within the Statute of Limitations the right of a person to upset a transaction on the ground of undue influence will not be barred whilst the undue influence continues. To this argument there are in my opinion at least two answers. The first is the technical one that in my view undue influence was not pleaded or intended to be pleaded as an answer to the Statute. The second is that even if the law contended for by Mr. Murphy be correct, it was necessary for the plaintiff that he should have obtained a finding from

C.A. 1935.

O'NEILL v. MURPHY AND OTHERS.

ANDREWS, L.J.

the jury that the undue influence not only existed at the date of the contract, but that it continued up till at any rate within a period of six years before action brought. No such finding was sought or obtained by the plaintiff. Indeed, no such averment was contained in pleadings or particulars, and no specific evidence as to when he was emancipated from the undue influence was given save that the plaintiff admitted that he gave two sums of £50 on 13th October, 1928, for masses "of his own free will." This evidence, coupled with the fact that he had since been acting as architect of the work executed under the McDonnell contracts, would, I think, have made a jury which obviously experienced difficulty in finding undue influence at the time of the contract, hesitate still longer before they found its continuance for any definite period. It is enough, however, to say that it was for the plaintiff to obtain a finding from the jury upon the point if he intended to rely upon it; and it is not for us to speculate upon what the finding to any such question might have been.

Canon Murphy's letter of 10th November, 1933, however, contains in my opinion a clear unconditional promise to pay on demand the entire amount claimed with the exception of the balance due in respect of Taggart's contract. I, accordingly, hold that the plaintiff is entitled to recover £30 in respect of the first part, £227 5*s*. 0*d*. on the third part, and £112 13*s*. 0*d*. on the fourth part of the claim, these three sums amounting to £369 18*s*. 0*d*. Against this the defendants have lodged in Court the sum of £370. Accordingly judgment will be entered for the defendants.

The money in Court will as to 2/–, the excess over the amount due to the plaintiff, be paid out to the defendants and the balance will be paid to the plaintiff.

In regard to the costs the strict legal rights of the parties would appear to be as follows:—The defendants would be entitled to their general costs of the action from the date of the lodgment in Court. The plaintiff would, however, be entitled to his costs of action up to the date of such lodgment, and also to his costs of the issues relating to undue influence and to the validity

of the alleged agreement of September, 1926, upon which he has succeeded. The costs so awarded to the plaintiff and to the defendants, respectively, would be set off against one another and execution would issue in favour of the party entitled to the balance.

This would involve a very complicated and prolonged taxation with possibly further appeal to this Court. If we were asked to assist the taxing master as to the time occupied in argument upon the several issues in this Court, we would probably say that approximately three-fourths of the argument in this Court related to the issues upon which the plaintiff succeeded. On the other hand, the defendants' rights to the general costs of the action at and before trial would possibly turn the balance of the costs in the King's Bench Division in their favour. In all the circumstances, and in the interests of both parties, we are clearly of opinion that the justice of the case can be best met by ordering, as we propose to do, that each party shall abide his or their own costs of the entire proceedings, including the appeal in this Court.

Andrews, L.J.

Best, L.J.

Best, L.J.: At the trial of the action which was had before the Lord Chief Justice and a special jury, the learned judge abstained from directing any judgment to be entered on the findings of the jury, the parties to be at liberty to apply therefor as they might be advised, and accordingly they now move the Court for judgment or a new trial or seek the relief set forth in their respective notices of motion.

The first named defendant, Bernard Canon Murphy, died before the trial of the action and representation not having been taken out to him, the action proceeded against the two remaining defendants as representing the religious order known as the Cross and Passion Order.

The action was brought to recover £1,105 3*s.* 0*d.*, balance of monies due to the plaintiff for work and labour done, money expended and services rendered by the plaintiff for and at the request of the defendant Canon Murphy and the Cross and Passion Order in connection with the planning and erection of buildings at Ballycastle in the County of Antrim.

C.A. 1935.

O'Neill v. Murphy and Others.

Best, L.J.

As to one portion of the plaintiff's claim, the defence relied upon is that the plaintiff and defendants by letters interchanged between them in the month of September, 1926, agreed that the defendants, the religious order known as the Cross and Passion Order, should perform certain services, in the plaintiff's letter of September 14th, 1926, specified, for the benefit of the plaintiff and his family, and that the plaintiff should accept performance of the said services, together with a further sum of £200, in full satisfaction and discharge of the plaintiff's cause of action, if any, in so far as the same relates to the balance due, if any, in respect of the said portion of the claim. The defendants plead that in pursuance of the said agreement they have performed the said services and have paid the sum of £200 which the plaintiff accepted in full satisfaction and discharge of the balance due, if any, in respect of the said portion of the plaintiff's claim.

As an alternative defence to the said portion of the claim, the defendants say that they were exonerated and released from all liability therefor by the said agreement entered into and contained the said letters, and that the same was discharged by payment before action brought, and further that the labour and work done, the said money expended and the said services were rendered voluntarily and as an act, or acts, of courtesy by the plaintiff.

The defendants plead also that the plaintiff's claim, in so far as it relates to all items prior to January 15th, 1928, is barred by the Statute of Limitations (16 & 17 Vict., c. 113, sec. 20), and as to a portion of the claim amounting to £499 18*s.* 0*d.* they pleaded tender before action brought, but this plea was abandoned and the paragraphs of the defence relating thereto were by consent struck out at the trial of the action.

The defendants also, whilst denying liability, brought into Court the sum of £370 as being sufficient to discharge their liability, if any, to the plaintiff, and particularly their liability for that portion of the plaintiff's claim consisting of the items amounting to the said sum of £499 18*s.* 0*d.*

The plaintiff in his reply pleads that if he made the agreement alleged to be contained in the said letters, he was induced to do so by the undue influence of his spiritual adviser, the Very Reverend Canon Bernard Murphy, the first named defendant, that there was no consideration for the said agreement, and in reply to the defence of the Statute of Limitations the plaintiff relies upon an acknowledgment of this portion of his claim in writing signed by the defendants or their agent and by part payment of the said portion of the claim.

The questions submitted to the jury on the trial of the action with their answers were as follows :—

1st. Was the plaintiff induced to enter into the agreement alleged in paragraph 2 of the defence by the undue influence of the Very Reverend Canon Bernard Murphy ? Answer : Yes.

2nd. Were the payments made by the defendants Mary J. Kane and Catherine G. Conlan in 1930 and 1932 on foot of the general account of the plaintiff ? Answer : No.

3rd. Did Canon Murphy act as agent for the other defendants in all these transactions. Answer : Yes.

The answer to this third question is not challenged by the defendants Mary J. Kane and Catherine G. Conlan.

The agreement relied on by the defendants in answer to the major portion of the plaintiff's claim is contained in three letters dated respectively, September 14th, September 18th and September 20th, 1926, none of which it is necessary to set out.

These letters are relied upon by the defendants as constituting an agreement between themselves and the plaintiff whereby the plaintiff gave up his right to the payment of the monies admittedly due to him in September, 1926, and in reply to this defence the plaintiff says : " I was induced to enter into the " agreement contained in them by the undue influence " of your co-defendant and agent, Canon Murphy, and " even if I did enter into it without the exercise of such

C.A. 1935.

O'NEILL v. MURPHY AND OTHERS.

BEST, L.J.

"undue influence, yet there was no consideration for "the agreement.

The jury having found the issue of undue influence in plaintiff's favour, I will assume for the purposes of this judgment that the finding is correct, though a great deal might be said against this view having regard to the absence, or at any rate the scanty nature, of any satisfactory evidence that the relationship between the plaintiff and Canon Murphy was that of devotee and spiritual adviser, and when one remembers that the plaintiff was an architect practising his profession, aged a little over sixty years at the date of the agreement, in full possession of his faculties, and perfectly free to consult his friends or legal advisers on the question of giving up fees which he had fully earned, I think a great deal might be said against applying to this case the principles laid down in such cases as *Huguenin v. Beaseley* (1), and *Allcard v. Skinner* (2).

The plaintiff, however, has not pleaded, nor has any attempt been made to prove, that the dominion and influence of Canon Murphy over him which, it is assumed, caused him to make the offer contained in the letter of September 14th, 1926, and to enter into the impugned agreement, operated after that time so as to prevent him pursuing his legal remedies until the date of the issue of the writ.

In order to avail himself of the submission that the undue influence under which he was suffering prevented the Statute of Limitations running against him, the plaintiff must, in my opinion, plead and *prove* that such undue influence continued to hold him in its grasp down to a point of time within six years before action brought. If he were able to show the existence of such a state of affairs he would, I think, bring himself within the principle of *Oelkers v. Ellis* (3), *Blennerhasset v. Day* (4), and *Hatch v. Hatch* (5), and would be entitled to set up the existence of the undue influence as an answer to the running of the Statute,

(1) 14 Ves. 243, White & Tudor L.C. (9th Edition) 203.
(2) 36 Ch.D. 145.
(3) [1914] 2 K.B. 139.
(4) 2 Ball & Beatty 104.
(5) 9 Ves. 292.

but as the case stands we do not know how long that influence operated or when it ceased. Accordingly in my opinion this part of plaintiff's case fails.

To take his case out of the Statute the plaintiff is therefore forced to rely on part payment or acknowledgment. The payments which he relies upon are those made in 1930 and 1932. The jury have found by their answer to question No. 2 that these payments were not made on foot of the general account of the plaintiff, and an examination of his books appears to me to supply ample evidence to support this finding. Further, at the time they were made, the defendants must have believed that their liability on the general account had been got rid of by reason of the agreement contained in the letters of September, 1926, and it is difficult, if not impossible, to see how the plaintiff in accepting the payments could, or did, accept them in respect of an account which presumably had been liquidated in the way mentioned. The debt has not, therefore, in my opinion been kept alive by part payment, and the question remains whether there has been such an acknowledgment of it or such a promise to pay as preserves the plaintiff's remedy.

As stated by Mellish, L.J., in *In re River Steamer Co.* (1), there must be one of three things to take the case out of the Statute. Either there must be an acknowledgment of the debt from which a promise to pay is implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed.

The letter relied upon by the plaintiff as fulfilling one or more of these conditions is that written by Canon Murphy to Mr. Russell, plaintiff's solicitor, dated 10th November, 1933. Putting it at the very highest in favour of the plaintiff, that letter, in my opinion, only contains a conditional promise to pay the debt, which condition has not been and cannot now be performed. Canon Murphy says: "I can therefore only pay Mr. "O'Neill when he, on oath, convinces the judge and "myself that when he wrote the above letter (*i.e.*, the

(1) L.R. 6 Ch.A.C. 822, 828.

C.A. 1935.

O'Neill v. Murphy and Others.

Best, L.J.

"letter of 14th September, 1926) and accepted the "nuns' little present of £200 as a small recognition of "his *then* generous gesture, he did not believe a word "of it, and was deliberately deceiving the nuns and "myself and *many many* others to whom I read his "letter." The condition set out in this letter has not been performed and is now impossible of performance. But it is said further that paragraph 8 of the defence in itself constitutes an acknowledgment of part of the debt due on Taggart's account because the sum of £499 18*s.* 0*d.* therein pleaded to, consists of three items, £30, £307 5*s.* 0*d.* and £162 13*s.* 0*d.*, and the £30 referred to is the sum of £30 which appears as the first item on the general account sued for. This so-called acknowledgment was made, if at all, after action brought, and it cannot, in my opinion, operate to take the case out of the Statute.

In the view I have taken of the whole matter, it is unnecessary to decide whether there was any consideration for the agreement alleged to be contained in the three letters of September, 1926. I must observe, however, that there is great force in Mr. McGonigal's submission that if there were no consideration there was no agreement at all and the plaintiff in that event could not succeed unless he showed that his claim is not barred by the Statute of Limitations. I think he has not done this, and the claim therefore fails in respect of that portion of it to which the Statute has been pleaded.

The sum lodged in Court is, together with the payments made in 1930 and 1932, more than sufficient to meet the balance of the claim.

The defendants are, accordingly, in my opinion, entitled to judgment, and as to the costs of the action and of this appeal I agree with the judgment of Lord Justice Andrews and with the reasons he has given for letting the parties respectively abide their own costs in the King's Bench Division and of this appeal.

Solicitor for the plaintiff : *James L. Russell.*
Solicitor for the defendants : *William J. Boyd.*

J. McC.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST (1).

Ch.D. 1934.

May 9.

C.A. 1934.

June 18, 19. July 5.

Statutory Provision of Cottages for Ex-servicemen—Power of Trust to Charge Rents—Relationship of Trust to Ex-servicemen—Agreements of tenancy—Estoppel—Irish Land (Provision for Sailors and Soldiers) Act, 1919 (9 & 10 *Geo.* 5, *Ch.* 82) *sections* 1 *and* 4 (4), (5), (6) *and* (7)—*Irish Free State (Consequential Provisions) Act*, 1922 (13 *Geo.* 5, *sess.* 2, *Ch.* 2, *section* 3—*Land Trust (Powers) Act (Northern Ireland)*, 1923 (13 & 14 *Geo.* 5, *Ch.* 19) *sections* 1 *and* 3—*Irish Sailors' and Soldiers' Land Trust (Amending) Regulations*, 1925, *Statutory Rules and Orders*, 1925, *No.* 303, *Clause* 16.

By section 4 of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, the Local Government Board was given power to make and carry out schemes for the provision of cottages for the accommodation of men who had served in any of His Majesty's naval, military, or air forces during the Great War and who satisfied the Board as to their fitness and suitability. Subsequently by virtue of the provisions of section 3 of the Irish Free State (Consequential Provisions) Act, 1922, all the powers conferred upon the Local Government Board for Ireland were vested in the defendants.

Each of the plaintiffs having duly satisfied the Trust as to his fitness and suitability entered into an agreement of tenancy with the defendants and was provided with a cottage in respect of which he paid rent for several years. On a claim for a declaration that the plaintiffs were entitled to occupy the said cottages for life, free from all rent, rates, taxes and all other burdens and charges,

Held (affirming the decision of Megaw, J.), that the relationship between the defendants and the plaintiffs was merely that of landlord and tenant and not that of trustee and *cestui que* trust, and that the defendants had power to charge rents for the said cottages.

ACTION by four ex-servicemen each of whom occupied a cottage in Northern Ireland, provided under the provisions of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, the Irish Free State (Consequential Provisions) Act, 1922, and the Land Trust (Powers) Act (Northern Ireland), 1923, by the defendants, for a declaration :—

(1) In the Court of Appeal before Andrews and Best, L.JJ.

Ch. D. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

(1) That upon a true construction of the said Acts the plaintiffs and all other ex-servicemen who held cottages in Northern Ireland provided by the defendant Trust under the provisions of the said Acts were entitled to be provided with a cottage either (*a*) in fee simple or (*b*) for such lesser estate as the defendant Trust had in the land.

(2) In the alternative that the plaintiffs and all other ex-servicemen held the said cottages, each for the term of his natural life, free from all rent, taxes, costs of repair and all other burdens and charges.

(3) That the contracts of tenancy in respect of the said cottages between the defendant Trust and the plaintiffs or any other of the said ex-servicemen were wholly null and void.

In addition the plaintiffs claimed an injunction to restrain the defendants from seeking to recover rent or possession of the said cottages.

At the hearing of the action before Megaw, J., the claim for an estate in fee, or lesser interest of the defendants, was abandoned.

Campbell, K.C., McKean, K.C., and *Condy* for the plaintiffs.

Murphy, K.C., Davison, K.C., Warnock, K.C., and *Chambers* for the defendants.

MEGAW, J.

MEGAW, J.: I do not think it necessary for me to defer delivering judgment in this case though, perhaps if I did so, I might be able to deal with the matter in more logical sequence.

The action was brought by four ex-servicemen who claim to be entitled to certain cottages by virtue of the Trust declared by the Irish Land (Provision for Sailors and Soldiers) Act, 1919. They have been put in possession of these cottages and though they signed applications for the same and have agreed to pay rents they contended at first that they were entitled to them in fee simple, but they now claim a life interest without liability for rent, rates or other outgoings, and that the selection first by the Local

Government Board and afterwards by the Trust entitled the occupiers of the cottages to the benefits arising from uncontrolled possession as against all the other ex-servicemen who had no cottages.

The Statute under which they claim is the Irish Land (Provision for Sailors and Soldiers) Act, 1919, section 1 of which provides for advances under the Land Purchase Acts for the purchase of lands vested in the Land Commission to be made to ex-servicemen who satisfy the Estates Commissioners of their fitness and suitability. The payments made under these statutes would continue for about sixty years and would represent, as Mr. Murphy said, interest together with a small provision for sinking fund, so that in the end the men would become owners of the lands after having paid off these liabilities. But Mr. Campbell has differentiated between the ex-servicemen of the country and of the towns and he argues that the Trust has no power to fix and levy rents for these cottages which have cost between £600 and £1,000 each.

No trouble had arisen for the last fourteen years and the rent was paid without dispute. It has now apparently been discovered that the Local Government Board had been acting wrongly and that once the ex-serviceman was put in as tenant he was entitled to stay there for life without paying any rent. It would seem to be rather strange if that were so.

Mr. Campbell bases his argument on section 4 of the Act of 1919. It is obvious that what was intended by the legislature was something more than a scheme for building cottages and giving them to selected ex-servicemen. For the purpose of carrying out any scheme the Local Government Board have powers by section 4 (4) to exercise all powers, except powers of borrowing or levying rates, that could have been exercised by a rural district council under the Labourers (Ireland) Acts, 1883-1919. In those Labourers Acts there are powers of charging rents and sub-section 4 of section 4 of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, provides that those Labourers Acts shall apply with certain modifications. That would seem to incorporate these Acts and under those

Ch. D. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

MEGAW, J.

Acts it is manifest that the charging of rents was part of the scheme.

Mr. Campbell contends that the sub-section is not to be so read but that the Labourers Acts are only to be incorporated in so far as they give powers of acquiring lands. I see no such limitation in the words of the Act. Section 8 provides that the Act, in so far as it relates to the provision of cottages, plots or gardens under the Labourers' (Ireland) Acts, 1883-1919, shall be construed as one with those Acts. Surely that gives them power to create rents. Sub-section (3) of the Schedule to the Land Trust (Powers) Act (Northern Ireland), 1923, vests in the Irish Sailors' and Soldiers' Land Trust all the powers which were conferred upon the Local Government Board for Ireland by section 4 of the Irish Land (Provisions for Sailors and Soldiers) Act, 1919, and such powers of management, sale, disposal and otherwise as may be conferred on them by regulations made by the Treasury. Mr. Campbell—as to support his argument he was compelled to do—contended that the Treasury Regulations were *ultra vires*. I really see no ground for the limitation contended for by Mr. Campbell and accordingly I hold that the plaintiffs cannot succeed in this action.

On the question of estoppel where the plaintiffs contended that the defendants having made their selection of tenants were bound by their choice, I think that the true answer to the plaintiffs' submission was indicated by me during the course of the argument, namely, that if Mr. Campbell's contention was good, the Trust had acted illegally and what they had done would be set aside as null and void.

They had made their selection on wrong considerations which would have rendered them liable to restraint by the Court and the ex-servicemen going into possession of the cottages would have no title to them at all.

I therefore hold that the declarations sought cannot be made and that the action shall be dismissed with costs.

The plaintiffs appealed to the Court of Appeal.

Campbell, K.C., *McKean, K.C.*, and *Condy* for the appellants :—

In section 1 (4) of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, which gives the Land Commission power to manage and let land in certain circumstances the power to manage is quite independent from the power to let. Nowhere in the Act of 1919 does the legislature give the Local Government Board power to let the cottages provided under section 4. "Schemes" under section 4 of the Act of 1919 means anything connected with and necessary to the acquisition of the land and the erection of buildings but does not extend to letting. It is only when such cottages cease to be required for the accommodation of ex-servicemen that they may be let under section 4 (5). Section 4 (6) is not a general incorporation of the Labourers' Acts, but those Acts were incorporated only in so far as they give powers of acquiring land.

The "receipts" referred to in section 4 (7) refers only to receipts from cottages let under section 4 (5).

The Treasury Regulations, Statutory Rules and Orders, 1925, No. 303, made under section 3 (3) and (5) of the Irish Free State (Consequential Provisions) Act, 1922, are, in so far as they purport to empower the Trust to charge rents *ultra vires*. The defendants having made their selection of tenants are bound by their choice.

When an ex-serviceman has satisfied the "Trust" as to his suitability, his statutory right to occupy a cottage immediately accrues apart altogether from tenancy agreements. The right is statutory not contractual. In *Fairtitle v. Gilbert* (1), it was held that the trustees of a public Turnpike Act which empowered them to erect toll-houses and mortgage the tolls, and which declared that there should be no priority among the creditors, had no power to mortgage the toll-houses or gates. And that in fact if they had made such a mortgage, and an ejectment was brought against them by the mortgagee, they were not estopped

(1) 2 T.R. 169.

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

by their deed from insisting that the Act gave them no such power.

In *Batten Pool v. Kennedy* (1), Warrington, J., said: "... I am satisfied that no authority can be "produced in support of the proposition, that a "voluntary payment made under a supposed legal "liability creates in law any obligation at all, and I "know of no rule of law which would prevent me "from giving effect to what I find to be the true "rights of the parties under any supposed motion of "estoppel, a doctrine to which it is not too much to "say the Court will not resort except in the last "extremity."

In the *York Corporation v. Leetham and Sons, Ltd.* (2), Russell, J., said: "An *ultra vires* agreement cannot "become *intra vires* by reason of estoppel, lapse of "time, ratification, acquiescence, or delay."

[They also referred to *The President and Governors of Magdalen Hospital v. Knotts* (3), and *Leggett & Others v. The Irish Sailors' and Soldiers' Land Trust* (4).]

Murphy, K.C., Davison, K.C., Warnock, K.C., and *Chambers* for the respondents:—

In the Artisans' Dwellings Act, 1875, section 5, the Labourers (Ireland) Act, 1883, section 4, the Housing of the Working Classes Act, 1890, section 11 (1) and the Labourers (Ireland) Act, 1906, section 6 the word "accommodation" is used in the sense of providing houses at a rent. In no statute is free accommodation provided. One of the fundamental principles of the Labourers Acts is the provision of cottages at a rent as in section 13 of the Labourers Act, 1883.

If, as is admitted by the appellants, "expenses" in section 4 (7) of the Act of 1919 has a general meaning why should "receipts" in the same sub-section bear a limited meaning.

Section 1 (1) of the Land Trust (Powers) Act (Northern Ireland), 1923, gives the Trust all the powers conferred by the scheduled enactment or by regulations

(1) [1907] 1 Ch. 256, 268.
(2) [1924] 1 Ch. 558.
(3) 4 A.C. 328.
(4) Not reported.

made thereunder. Powers of leasing are incorporated in the word "management" in cases like this of the provision of cottages.

The Irish Sailors' and Soldiers' Land Trust (Amending) Regulations, 1925, made by the Treasury giving the Trust power to charge rents are *intra vires*. Section 3 (3) of the Land Trust (Powers) Act (Northern Ireland), 1923, gives the Treasury powers of making regulations for the management, sale, disposal and otherwise. These are very wide terms and the Treasury Regulations come clearly within them. [They referred to the judgment of O'Connor, M.R., in *O'Shea v. Cork Rural District Council* (1).]

The plaintiffs obtained possession of the said cottages by virtue of contracts of tenancy made between them and the defendants and are estopped from disputing the defendants' right to enforce the terms of such contracts and from disputing the validity of such contracts. The defendants were incorporated for the purpose of carrying out certain statutory provisions. The Act of 1919 is not a trust instrument and the defendants do not stand in any fiduciary relationship to ex-servicemen or to the plaintiffs in particular.

Fairtitle v. Gilbert (2) has no bearing on the case. In that case there was an estoppel by deed. The statement of Russell, J., in *York Corporation v. Henry Leetham and Sons, Ltd.* (3), relied upon by the appellants was a dictum only. *Cur. ad. vult.*

ANDREWS, L.J.

ANDREWS, L.J.: In this action four ex-servicemen, each of whom occupies a cottage in Northern Ireland which was provided for his accommodation by the defendants under the Irish Land (Provision for Sailors and Soldiers) Act, 1919, the Irish Free State (Consequential Provisions) Act, 1922, and the Land Trust (Powers) Act, 1923, claim on behalf of themselves and all other ex-servicemen who hold cottages in Northern Ireland provided by the defendants that they are each entitled to be provided with a cottage either (*a*) in fee simple or (*b*) for such lesser estate as the defendant Trust has

(1) [1914] 1 I.R. 16, 21.
(2) 2 T.R. 169.
(3) [1924] 1 Ch. 558.

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

ANDREWS, L.J.

in the land. Alternatively, their claim is to occupy such cottages for life free from all rent, rates, taxes, costs of repair and all other burdens and charges. A declaration is also sought that their contracts of tenancy are null and void, and an injunction is asked for to restrain the defendants from seeking to recover rent or possession of the cottages.

The writ of summons contained a further alternative prayer for a declaration that the rents were excessive, and that same should be assessed on each cottage solely by reference to the just and proportionate share attributable to each cottage of its upkeep and of the necessary expenses of administration of the defendants' Trust Fund in Northern Ireland, and that the defendants were trustees for the respective ex-servicemen of all overpayments. This latter relief was abandoned in the statement of claim ; and the claim set out in the forefront of both writ and statement of claim, namely, for an estate in fee or lesser interest of the defendants, shared a like fate at the hearing of the case before Megaw, J., and in our own Court, as it was recognised that it was absolutely inconsistent with the provisions of section 4 (5) of the Act of 1919. Although, accordingly, we are not directly concerned with such claims in this Court they cannot be wholly ignored, as they disclose the greatest uncertainty on the part of the plaintiffs and their legal advisers up to the moment of trial as to the existence and nature of their supposed rights regarding which they sought the Court's declaration and assistance.

One further material abandonment of the plaintiff's case as foreshadowed in their statement of claim was made at the trial before Megaw, J. Paragraph 4 of the claim averred that the defendant Trust, in breach of its duties under the Acts, compelled the plaintiffs and other ex-servicemen who received cottages, being at that time ignorant of their rights, to enter into the contracts of tenancy. As these averments were expressly traversed in the defence and as the plaintiffs refrained from calling any witnesses whatever, all allegations of duress by the defendants and of ignorance on the part of the plaintiffs must be regarded as having

completely failed. The former at least should never have been made.

The procedure followed by the plaintiffs and other ex-servicemen in obtaining their cottages was the making of a written application containing answers to certain queries regarding their family circumstances, war service and disability, and other relevant matters. The acceptance of such applications was followed by the completion of the agreement of tenancy, from which the plaintiffs now seek to be relieved. There is no room for doubt or argument as to the nature of these agreements which reserve rents and subject "the "tenants" to certain tenancy conditions; and, when Mr. Campbell contended on behalf of the plaintiffs that they entered into possession of their cottages under the Acts of Parliament quite apart from their contracts of tenancy, such contention obviously must not be taken literally as a statement of fact but purely as a submission of law. Whether he is right or not in such submission it is our duty to determine.

The question to be answered is simply whether the defendants had legal sanction and authority for imposing the conditions of a tenancy, including reservation of rents, upon the plaintiffs, or whether they held the lands which they acquired and the cottages which they erected under their several schemes as trustees under the terms of a statutory trust in favour of selected ex-servicemen, who, as such, were entitled to the occupation thereof for their respective lives, not only free of rent, but free also of all rates, taxes, costs of repair, and other burdens which fall to be discharged by the Treasury. It is a far-reaching claim which was never advanced seriously, if at all, in Northern Ireland until the decision of the Supreme Court of The Irish Free State in a similar action of Leggett and others against the present defendants, which was given on 29th July, 1933.

The first of the Acts of Parliament relied upon is the Irish Land (Provision for Sailors and Soldiers) Act, 1919, to which I have already referred. Its scope and object are indicated in its title "An Act to facilitate "the provision of land in Ireland for men who have

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

ANDREWS, L.J.

"served in the . . . Forces of the Crown . . ." It is conveniently divided into two parts. Sections 1 to 3 inclusive relate to the provision of holdings out of parcels of estates or untenanted land vested in the Land Commission. The method of procedure availed of for making such provision is the making of advances under the Land Purchase Acts, by virtue of which the tenant purchaser becomes the owner in fee simple of his holding, subject to the payment of a terminable annuity. Section 4 is the principal section dealing with the provision of cottages. Here the power of making and carrying out schemes is entrusted to the Local Government Board; and the available procedure is found, subject to certain specified exceptions, in The Labourers (Ireland) Acts, 1883 to 1919. This is provided for by sub-section 4 of that section which enacts as follows:—

> "For the purpose of carrying out any scheme "when so confirmed, the Local Government Board, "in addition to their other powers, shall have and "may exercise all the powers except powers of "borrowing or causing a rate to be levied that may "be exercised by a rural district council under the "Labourers (Ireland) Acts, 1883 to 1919, for the "purpose of carrying out an improvement "scheme. . . ."

The first question which arises to be determined upon this section is whether the powers of letting possessed and exercised by a rural district council under the Labourers' Acts is a power which may be exercised "for the purpose of carrying out an im-"provement scheme." Upon this point there is in my opinion no doubt, as sections 12 and 13 of the Act of 1883, relating to lettings, fall within the portion of the Act which is entitled, "Execution of scheme by "Local Authority," and the former section actually uses the phrase "carrying the scheme into execution." Again in section 29 of the Act of 1906 letting is treated as a means of "carrying the provisions of the Acts "into effect." If lettings under the Labourers' Acts be regarded by parliament as part of the "execution "of a scheme" or of the "carrying of it into execution"

it seems obvious that lettings under the Act of 1919, with which by section 8 they are for the purpose of the provision of cottages to be construed as one, must also be held to be part of the "carrying out of a "scheme" under that Act. It seems to me also that the arguments of plaintiffs' counsel upon this matter are quite inconsistent; for when we asked how the expenses of repairs and other matters were to be defrayed if no income were available from rents we were referred to section 4 (4) (*c*) and 4 (7) of the Act of 1919 in support of the view that they were to be defrayed out of moneys provided by parliament. Now both of those sub-sections relate to expenses incurred "in making and carrying out schemes," and I am at a loss to understand how it can be said that in construing one part of the section "the carrying "out of a scheme" ends with the acquisition of land and the erection of cottages and does not include their letting, yet in construing another part of the same section the very same words include provision for repairs after the lettings have been made. Plaintiff's counsel contended that the letting or otherwise dealing with the cottages after erection is not a "carrying out of a "scheme" but an "ultimate administration of the "houses." Mr. Murphy was, I think, entitled to ask in reply to this argument that, if the latter is not included in the former, where is the statutory authority to administer the houses at all. Further support is obtained for the view that the Local Government Board were empowered to make lettings at rents from the reference to "receipts" of the Board in respect of cottages in sub-section (7) and to the preparation of an "annual account" in sub-section (8); for in my opinion the full meaning and significance of the word "receipts" is not satisfied, as plaintiffs contend, by receipts under sub-section (5) from lettings or other disposals of cottages after they have ceased to be required for the accommodation of ex-servicemen.

I conclude my references to the Act of 1919 by saying that if parliament intended that the houses should be given to ex-servicemen rent free it could scarcely have failed to insert the words "free" or "free of rent"

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

ANDREWS, L.J.

in conjunction with the word "provision" in section 4 (1), and to have expressly excluded the letting provisions of the Labourers' Acts as it excluded the powers relating to borrowing and levying of rates. It also seems to me unintelligible why those ex-servicemen for whom cottages are "provided" should be accommodated rent free whilst other ex-servicemen—equally deserving members of the same class—for whom holdings are "provided" under the earlier sections of the same Act should be required to pay purchase annuities.

I have referred at length to the relevant sections of this Act of 1919 and the incorporated provisions of the Labourers' Acts because they seem to me to go to the root of the whole question. They have, in my opinion, this further special importance that they relate to powers conferred at a time when the controlling administrative body was a government department and before any conception of an administrative body called a "Trust" had ever arisen. Accordingly, arguments based on the use of the word "Trust" when relating to these earlier statutory provisions are both erroneous and fallacious. They contained no element whatever of a fiduciary character.

It was under the Irish Free State (Consequential Provisions) Act, 1922, that this new administrative body, called the "Irish Sailors' and Soldiers' Land "Trust" (referred to for sake of brevity as "the "Trust") was created. It is argued that the mere use of this term indicates a change of policy upon the part of the legislature. There is in my opinion no foundation for such a contention. The class to benefit by the legislature—the ex-servicemen—was the same; the nature of the benefit—the provision of cottages—was the same; and the source from which the funds came—public funds voted by parliament—was the same. By section 3 (3) there is conferred on the Trust all the powers conferred on the Local Government Board by section 4 of the Act of 1919, including power to carry out the schemes made by the Board prior to the passing of the Act of 1922, and such powers of management, sale, disposal and otherwise

as may be conferred on them by regulations made by the Treasury. By section 3 (5) the Treasury is expressly empowered to make such regulations in reference to certain specified matters and generally as to the manner in which the Trust should carry out their powers and duties. Section 3 (7) provided that the section should not come into operation until the Treasury certified that legislation had been passed by the Parliament of the Irish Free State and the Parliament of Northern Ireland to enable the Trust to acquire and hold land and otherwise to carry out the purposes of the section.

I shall not dwell further upon this Act than to say that it expressly transfers to the new Trust all the powers vested in the Local Government Board by section 4 of the Act of 1919; and, far from placing any restriction or limitation upon the exercise of such powers, it grants such further powers of management, sale, disposal, and otherwise, as may be conferred on them by regulations. If my views upon the Act of 1919 be correct it is unnecessary to look for any new power of letting in the regulations; but I must say that in my opinion regulations made by the Treasury under sections 3 (3) and 3 (5) in reference to the letting of cottages could not be regarded as *ultra vires*. If they are not included in powers of "disposal or "otherwise" of the cottages (as to which, cf. the words "may be let or otherwise disposed of" in section 4 (5) of the Act of 1919) they are competently made as relating to "the manner in which the Trust should "carry out their powers and duties" (section 3 (5)).

Only one sub-section (1 (1)) of the Land Trust (Powers) Act (Northern Ireland), 1923, need be referred to. That sub-section provides that the Trust shall have and may exercise all the powers which are necessary to enable the Trust to carry out, as respects Northern Ireland, the purposes of section 3 of the Act of 1922, whether being powers conferred upon the Trust by that section or by regulations made thereunder.

That Act received the Royal Assent on 22nd June, 1923, and six months later—on 31st December, 1923—

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

ANDREWS, L.J.

the Treasury issued their first regulations, by No. 19 of which, subject to such minimum rent or rents as might from time to time be fixed by the Treasury, the Trust were empowered to fix rents at their discretion in each case. Other provisions in regard to writing off arrears of rent, and the collection and recovery of rent follow, and Regulation 9 (3) (*a*) provides for all rents received by the Trust being paid into the Revenue as distinguished from the Capital Account. In the face of such express provisions I attach no significance whatever to the substitution of the term "the "trustees" for "the trust" as a description of the statutory administrative body. Such alteration was wholly unnecessary; and in my opinion there is not the slightest justification in the use of either of such terms for the suggestion that either the whole class of ex-servicemen in Northern Ireland, or certain then unascertained and unselected members thereof, had their legal status and rights thereby altered in such a drastic manner as to constitute them beneficiaries, so that, when they were selected for the cottages, they became entitled under a so-called statutory trust instrument to claim and hold the cottages rent, tax and rate free for their lives against not only the trust but all other less fortunate members of the general body of ex-servicemen.

The regulations of 1923 were revoked by amending regulations of 1925, in which the use of the terms "The Trust" and "The Trustees" was sought to be reconciled by defining the Trustees to be the members of the Trust; and the provisions in regard to rents, whilst retained in substance, were modified by the withdrawal of the Treasury's power to fix minimum rents, the Trust being empowered to fix rents at their discretion in each case. This modification was, of course, not in any way prejudicial to but rather in ease of the tenants of the Trust.

For the reasons which I have mentioned I am of opinion that the plaintiffs' claim to assign a fiduciary character to their possession of their cottages in substitution for the relation of landlord and tenant, to which they voluntarily assented many years ago, is quite unsustainable.

I may say that I have carefully read the judgments of both Johnston, J., and the members of the Supreme Court in the case of *Leggett & Others v. The Irish Sailors' and Soldiers' Land Trust* (1), and I unhesitatingly accept the views expressed in the former, in which the powers of the Trust to make lettings was upheld. I am quite unable to accept the view that the claims of the Trust are "preposterous," for it was an undoubted boon to the men to get the cottages at reasonable rents. I am also unable to find any evidence either in the Acts or outside them that "the objects "of the Acts are better attained by giving free "accommodation to a selected number of deserving "ex-servicemen than by charging rents."

Holding the view which I have expressed upon the main issue in the case, it becomes unnecessary for me to express any concluded opinion upon the issue of estoppel, and I wish to refrain from doing so. I shall only say this, that on the arguments addressed to us, and as at present advised, I would not be prepared to hold that the plaintiffs, who failed to give any evidence of ignorance of their rights or of duress, and who paid rent and accepted benefits under their tenancy agreements, should be allowed after this lapse of time to dispute the defendants' title or their power to create the tenancies, and at the same time be permitted to retain possession of their cottages which was solely referable to the impugned agreements.

The appeal must be dismissed with costs.

BEST, L.J.: This appeal raises the question of the power of the defendants to charge rent for cottages provided for the plaintiffs by virtue of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, the Irish Free State (Consequential Provisions) Act, 1922, and the Land Trust (Powers) Act (Northern Ireland), 1923.

The Act of 1919 is described as: An Act to facilitate the provision of land in Ireland for men who have served in the Naval, Military or Air Forces of the

(1) Not reported.

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

BEST, L.J.

Crown in the present War, and for other purposes incidental thereto.

The first three sections of the Act deal with the provision of holdings for men who have served in any of His Majesty's Naval, Military or Air Forces in the War. It is provided that advances under the Land Purchase Acts for the purchase of parcels of estates or untenanted land vested in the Land Commission may be made to such of those men as fulfil certain conditions in like manner as if they were proprietors or tenants of holdings not exceeding £10 in rateable value. The provision of these holdings was not made without payment as the men selected were under an obligation to pay annuities appropriate to the advances made for the purchase of their holdings in the same way as if they were tenant purchasers under the Land Purchase Acts.

Section 4 of the Act enabled the Local Government Board for Ireland to make and carry out schemes for the provision of cottages with or without plots or gardens for the accommodation of men who have served as aforesaid and who satisfy the Board as to their fitness and suitability. Sub-section (4) of that section provided that for the purpose of carrying out any scheme when so confirmed the Local Government Board, in addition to their other powers, shall have and may exercise all the powers except powers of borrowing or causing a rate to be levied that may be exercised by a rural district council under the Labourers (Ireland) Acts, 1883 to 1919, for the purpose of carrying out an improvement scheme when confirmed by a final order under Section six of the Labourers (Ireland) Act, 1906, including other powers in said sub-section mentioned.

All the powers, except powers of borrowing or causing a rate to be levied, that may be exercised by a rural district council under the Labourers (Ireland) Acts, 1883 to 1919, for the purpose of carrying out an improvement scheme clearly include powers of letting the cottages at a rent.

One has only to look at these Acts to see that the charging of rents for the cottages was an essential part

of every scheme that was to be carried out, and just as the men for whom provision of holdings was made under the first three sections of the Act of 1919 were not provided with free holdings, so neither was it intended that men provided with cottages under section 4 should have them free. The power to let the cottages at rents was, in my opinion, given by sub-section (4) of that section, and if the power was given it must have been intended that it should be exercised, and at any rate there is power to exercise it. Mr. Campbell is driven to argue that in section four, sub-section (1), the word "free" should be inserted before the word "provision" so that the sub-section would read: The Local Government Board shall have power to make and carry out schemes for the free provision of cottages, etc. But if the legislature had intended this, there was no difficulty in saying so, and in that event it would have been essential that not alone powers of borrowing or causing a rate to be levied should have been excluded as in sub-section (4), but also powers of letting the cottages at rents under the Labourers Acts should have been placed in the same category.

Mr. Campbell further says that the words "schemes for the provision of cottages" mean anything and everything connected with, and necessary for, the acquisition of the land and the erection of the buildings, but do not include nor extend to such an incident as letting, that the Local Government Board did not need the power of letting for the carrying out of schemes in this limited sense, and consequently that no such power was given them. I find it impossible to put such a narrow construction on the meaning of the word "schemes." If this word means everything to be done until land has been acquired and until cottages have been erected and nothing more, how are the occupiers of the cottages to be selected and how are the schemes to be administered?

The Act of 1919, so far as it relates to the provision of cottages, plots or gardens under the Labourers (Ireland) Acts, 1883 to 1919, is by section 8 thereof to be construed as one with those Acts, and, in my

C.A. 1934.

HANNA AND OTHERS v. THE IRISH SAILORS' AND SOLDIERS' LAND TRUST.

BEST, L.J.

opinion, to "carry out schemes" under section 4 (1) of the Act of 1919 and the "carrying out any scheme" by the Local Government Board under sub-section (4) of the same section must mean the same thing as the execution of a scheme by the local authority or the carrying the scheme into execution. On looking at the Act of 1883 we find immediately before section 12 the caption: "Execution of Scheme by Local "Authority," and section 13, which relates to lettings, falls within this part of the Act, so that if letting is, as it clearly is, part of the execution of a scheme by the local authority, it is equally clearly part of the carrying out of the scheme by the Local Government Board, and such carrying out does not end with the mere provision of land and the erection of cottages.

Without considering further the provisions of the Act of 1919, I have come to the clear conclusion that the Local Government Board not only had power but that it was its duty to charge appropriate rents for the cottages erected under that Act.

Mr. Campbell, however, says that by virtue of the provisions of section 3 of the Irish Free State (Consequential Provisions) Act, 1922, a trust was created in favour of ex-servicemen in Ireland, that all the essentials of a trust deed are present, and that the provisions of this section are quite inconsistent with the relation of landlord and tenant between "the "Trust" and the ex-servicemen.

But in answer to this argument it may not be out of place to observe that a government having been established for Northern Ireland, and the Irish Free State having come into existence, there was no longer a Local Government Board for Ireland and, accordingly, if the provision of cottages for ex-servicemen were to be continued, it became necessary to establish a body capable of carrying out this work. The section just mentioned not only established that body, "the Trust," but strictly defined its powers. It was to have all the powers which are conferred by the Local Government Board for Ireland by section four of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, including power to carry out the schemes made under that section

by that Board prior to the passing of this Act, and such powers of management, sale, disposal and otherwise as may be conferred on them by regulations made by the Treasury. To say that because the body thus established is called "the Trust" a trust was created in favour of ex-servicemen whereby out of the many thousands of deserving men the lucky few who were selected to occupy cottages should do so free of rent, rates, repairs and insurance, is to put a construction upon the section which it cannot and should not bear.

I have already stated that, in my opinion, the Local Government Board for Ireland had under the Act of 1919 the power of imposing rents, and "the Trust" is endowed with all its powers as well as with those given it by regulations made by the Treasury. I therefore come to the conclusion that Mr. Campbell's argument on this point fails.

Having arrived at this conclusion I think it unnecessary to consider the question whether the defendants are estopped from denying that the plaintiffs are entitled to claim the relief which they seek, and I agree that the appeal should be dismissed with costs.

Solicitor for the appellants: *W. K. Gibson.*
Solicitor for the respondents: *J. H. B. Gunning.*

J. R.

K.B.D.
1935.

March 22.

GARBETT v. COOPER (No. 2) (1).
(1933. No. 3002.)

Solicitor—Lien—Charging order—Property recovered or preserved—Judgment for costs—Cross-judgments—Legal Practitioners (Ireland) Act, 1876 (39 & 40 *Vict., c.* 44), *section* 3.

The defendant obtained in an action judgment with costs against the plaintiff. Execution was issued on the judgment, and a return of *nulla bona* was made.

Subsequently an instalment order was made by the Lord Chief Justice after the plaintiff had been examined as to his means. The order provided for the payment of the amount due on the judgment by instalments of £10 0*s*. 0*d*. per quarter. No payment was made under this order.

An application was made for the committal of the plaintiff for his failure to comply with this order, and an order was made committing the plaintiff to prison for six weeks, unless he should within one week from the service of the order pay the instalment.

The plaintiff appealed from this order to the Court of Appeal.

The Court of Appeal discharged the order and ordered the defendant to pay to the plaintiff the costs of the appeal when taxed and also ordered that the plaintiff and defendant should respectively abide their own costs of the order under which the plaintiff was committed to prison for six weeks.

An application was made to the Court of Appeal upon the hearing of the appeal from the order of committal, on behalf of the defendant that the costs ordered to be paid by the defendant should be set off against the costs due by the plaintiff to the defendant. This application was refused and the Court of Appeal left the parties to their respective remedies against each other.

The plaintiff's solicitors, who had obtained for the plaintiff in the Court of Appeal, the order for costs, applied for a charging order on such costs under the Legal Practitioners (Ireland) Act, 1876.

Held, by Moore, L.C.J., that such costs were "property" "recovered" within the statute in respect of which an order of charge could be made.

MOTION on behalf of N. & F. Tughan, solicitors for the plaintiff, for an order that they should have a charge for their costs, charges and expenses as between solicitor and client of an appeal brought by them as solicitors for the plaintiff from an order of the King's

(1) In the King's Bench Division before Moore, L.C.J.

Bench Division, which was set aside with costs by an order of the Court of Appeal, dated 4th December, 1934. They also applied for an order giving liberty to issue execution in respect of the costs.

The application was made under-section 3 of the Legal Practitioners (Ireland) Act, 1876.

The plaintiff had brought an action against the defendant for personal injuries and for damages to a horse and van, caused by his having been knocked down by the defendant's motor lorry.

The Lord Chief Justice remitted the action, and the plaintiff appealed to the Court of Appeal (1).

The Court of Appeal consisting of Andrews, L.J., and Best, L.J., reversed the decision of the Lord Chief Justice.

The action was accordingly tried in the Superior Courts before a judge and special jury, when judgment was entered for the defendant with costs. These costs were taxed to the sum of £205 19*s.* 4*d.* Execution was issued on the judgment but the sheriff made a return of *nulla bona*.

Subsequently an instalment order was made by the Lord Chief Justice after the plaintiff had been examined as to his means. The order provided for the payment of the amount due on the judgment by instalments of £10 0*s.* 0*d.* per quarter. No payment was made under this order.

An application was made for the committal of the plaintiff for his failure to comply with this Order, and an Order was made committing the plaintiff to prison for six weeks, unless he should within one week from the service of the Order pay the instalment mentioned.

Upon this application the firm of N. & F. Tughan acted as solicitors for the plaintiff and subsequently served Notice of Appeal from the Order.

The Court of Appeal discharged this Order and ordered the defendant to pay to the plaintiff the costs of the appeal when taxed, and also ordered that the plaintiff and defendant should respectively abide their own costs of the order under which the plaintiff was committed to prison for six weeks.

(1) [1934] N.I. 129

K.B.D. 1935.

GARBETT v. COOPER (No. 2).

An application was made to the Court of Appeal upon the hearing of the appeal from the order of committal, on behalf of the defendant that the costs ordered to be paid by the defendant should be set off against the costs due by the plaintiff to the defendant. This application was refused and the Court of Appeal left the parties to their respective remedies against each other.

The costs of the plaintiff pursuant to the Order of the Court of Appeal were taxed and amounted to the sum of £24 10*s.* 0*d.*

The plaintiff's solicitors, Messrs. N. & F. Tughan, afterwards applied to the Lord Chief Justice for an order under section 3 of the Legal Practitioners (Ireland) Act, for an order that they should have a charge for their costs as between solicitor and client in the appeal brought by them from his order. They also applied for an order that the defendant should be directed to pay to them the sum of £24 10*s.* 0*d.*, being the taxed costs payable by the defendant to the plaintiff under the order of the Court of Appeal and for a further order that in default of payment by the defendant they should be entitled to issue execution.

A member of the firm of N. & F. Tughan, solicitors for the plaintiff, in his affidavit in support of the application, stated that it was through the instrumentality of his firm the order of the Court of Appeal was obtained and the costs ordered to be paid were recovered and preserved.

He also stated in his affidavit that the Court of Appeal upheld the plaintiff's appeal on the ground that he had no means to pay and that the plaintiff was unable to pay to his firm any part of the costs in respect of the appeal. He further stated that the motion was brought solely for the protection of his firm and not in any way in the interests of the plaintiff.

Fox for N. & F. Tughan, the applicants :—

We rely on *Johnston v. McKenzie* (1). That was a

(1) [1911] 2 I.R. 118.

case where the defendant had obtained judgment with costs against the plaintiff, and the plaintiff having subsequently recovered judgment with costs in an action for rent against the defendant, on which execution was issued, and a return of *nulla bona* made, the defendant's solicitor who had obtained for defendant the judgment with costs applied for a charging order on such costs under the Legal Practitioners (Ireland) Act, 1876.

It was held by the King's Bench Division, consisting of Lord O'Brien, L.C.J., and Gibson and Boyd, JJ. (*inter alia*) that such costs were " property recovered " within the statute in respect of which an order of charge could be made.

The present case on its facts is very similar to *Johnston v. McKenzie* (1). The applicants are now entitled to a charging order for these costs under section 3 of the Legal Practitioners (Ireland) Act, 1876.

Topping for the defendant :—

This is an absolutely discretionary order.

In *Higgs v. Schrader* (2) it was held by Lord Coleridge, C.J., that the motion for a charging order under 23 & 24 Vict., c. 127, s. 28, must be made before the judge who tried the cause.

The judgment in the present case does not constitute " property recovered or preserved " within the meaning of section 3 of the Legal Practitioners (Ireland) Act, 1876.

Johnston v. McKenzie (1) is not an authority for the proposition that a solicitor is entitled to recover costs which his client could not recover.

The object of section 3 of the Legal Practitioners (Ireland) Act, 1876, is merely to protect a solicitor who has a dishonest client.

[He also referred to *Maher v. Daly* (3).]

MOORE, L.C.J. : I would have refused the motion if I had been able to deal with it on the merits. The

SIR WILLIAM MOORE, L.C.J.

(1) [1911] 2 I.R. 118.
(2) 3 C.P.D. 252.
(3) 25 I.L.T.R. 16.

K.B.D. 1935.

GARBETT v. COOPER (No. 2).

SIR WILLIAM MOORE, L.C.J.

Court of Appeal held that I was wrong in remitting the action, and they retained it in the Superior Courts.

[His Lordship having stated the facts, continued] :— The Court of Appeal held that I had exercised my discretion in the wrong way.

I say nothing on the question of set off.

If property has been recovered or preserved through the instrumentality of the solicitors for the plaintiff, they are entitled to a charging order under section 3 of the Legal Practitioners (Ireland) Act, 1876, I have come to the conclusion that the plaintiff's solicitors are entitled to succeed in their application under this section ; these costs constitute property recovered or preserved. I also give liberty to issue execution.

The order will be in similar terms to those in the order in *Johnston v. McKenzie* (1).

The order made by the Lord Chief Justice was in the following terms :—It is ordered that the defendant pay to the said N. & F. Tughan the sum of £24 10*s.* 0*d.* taxed costs ordered to be paid by the defendant to the plaintiff under order of the Court of Appeal, dated 4th December, 1934, for which sum the said N. & F. Tughan are hereby declared entitled to a charge on the sum of £214 18*s.* 5*d.* taxed costs payable by the plaintiff to the defendant pursuant to judgment herein dated 7th February, 1934, and Order dated 4th June, 1934, and orders that in default of payment the plaintiff is to be at liberty to issue execution against the defendant for the said sum of £24 10*s.* 0*d.*, together with the costs of this motion and order, measured at the sum of £6 6*s.* 0*d.*

Solicitors for the plaintiff : *N. & F. Tughan.*
Solicitor for the defendant : *J. Morris McKee.*

J. McC.

(1) [1911] 2 I R. 118, 129.

THE KING (McCLAVE) v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE (1).

(1935. No. 7.)

K.B.D. 1935.

April 18.

Customs — Removing Uncustomed Cattle — Conviction — Justices' Order imposing unlimited term of imprisonment—Amendment of Order limiting imprisonment to six months—Conditional Order obtained before amendment of Order—Conditional Order not served on Justices until after amendment of Order.

A summons charged the prosecutor with being knowingly concerned in removing certain uncustomed cattle, to wit, six bullocks contrary to section 186 of the Customs Consolidation Act, 1876, whereby he had forfeited the penalty of treble the duty paid value of the cattle for which the Commissioners of Customs and Excise had elected to sue.

The complaint came before the Justices on 12th December, 1934, when the prosecutor was convicted.

The order made by the Justices provided that the prosecutor should forfeit and pay the sum of £175, and in default of payment within one month should be imprisoned without hard labour until that sum be paid.

On 26th February, 1935, the Justices who had made the order of 12th December, 1934, amended their order. The order as amended provided that the prosecutor in default of payment within one month should be imprisoned without hard labour for a period of six months unless the penalty be sooner paid.

On 22nd February, 1935, before the Justices had amended their order, the prosecutor obtained a Conditional Order for a Writ of Certiorari to remove into the King's Bench Division, for the purpose of being quashed, the orders made by the Justices.

The Conditional Order was not, however, served on the Justices until 27th February, 1935, the day after the Justices had amended their order.

On motion to make the conditional order absolute, notwithstanding cause shown.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the conditional order must be made absolute.

CERTIORARI.

A summons, dated 30th November, 1934, charged that the prosecutor on 5th October, 1934, at Fivemile-

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

K.B.D. 1935.

THE KING (McCLAVE) v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

town, County Tyrone, was knowingly concerned in removing certain uncustomed cattle, viz., six bullocks, contrary to section 186 of the Customs Consolidation Act, 1876, whereby he had forfeited the penalty of treble the duty paid value of the said goods for which the Commissioners of Customs and Excise had elected to sue.

The complaint came before Messrs. John Lendrum and Henry T. Armstrong, sitting as justices at Fivemiletown Petty Sessions, County Tyrone, on 12th December, 1934, when the prosecutor was convicted. He was adjudged to forfeit and pay for the offence the sum of £175, and in default of payment within one month, to be imprisoned without hard labour until that sum be paid.

On 26th February, 1935, Messrs. John Lendrum and Henry T. Armstrong, the justices who had made the order of 12th December, 1934, amended their order. The order as amended provided that the prosecutor in default of payment within one month should be imprisoned without hard labour, for a period of six months, unless the penalty be sooner paid.

On 22nd February, 1935, before the justices had amended their order, the prosecutor obtained a Conditional Order for a Writ of Certiorari to remove into the King's Bench Division, for the purpose of being quashed the order made by the justices, on the ground (*inter alia*) that the order was in excess of the jurisdiction of the justices and bad on its face, in that it ordered that in default of the payment of the fine the prosecutor should be imprisoned until the sum of £175 be paid.

The conditional order was not, however, served on the justices until 27th February, 1935, the day after the justices had amended their order.

Cause having been shown on behalf of the Commissioners of Customs and Excsie, the prosecutor applied to make the conditional order absolute, notwithstanding cause shown.

McCoy in support of the order :—

We rely on *Ex parte Austin* (1). In that case a

(1) 45 J.P. 302, 303.

person was charged with unlawfully using a trawl net so as to disturb an oyster bed, contrary to 31 & 32 Vict., c. 45, s. 53, and was convicted and fined one shilling.

The conviction when filed with the clerk of the peace omitted the word "knowingly," whereupon a certiorari was moved for, and after rule *nisi* the justices drew up a fresh conviction, including the word "knowingly," and sent the same to the clerk of the peace.

It was held that the fresh conviction was no answer to the rule which must be made absolute.

In that case Lord Coleridge, C.J., said in his judgment, "The argument is that where magistrates have "made an illegal and defective conviction, the subject "of that conviction must either acquiesce in it or "having raised his case upon an *ex parte* argument "and obtained a rule for a certiorari to quash the "conviction, he must run the risk of being met, upon "the argument of the rule obtained to enable him to "get rid of a bad conviction, by a good conviction, "which has been subsequently drawn up as an answer "to the rule. Mr. Willis has not been able to satisfy "me that any principle, still less that any authority, "exists which supports such a doctrine—that when "once a bad conviction has been filed in the records "of the quarter sessions the magistrates in answer "to a rule to set it aside may return a good one."

The prosecutor, in the present case, ought not to be obliged to run that risk.

On the authority of *Ex parte Austin* (1), the matter was crystallised when the conditional order obtained *ex parte* was granted.

I rely on *The King (Meehan) v. Chairman and Justices of County Tyrone* (2), where it was held that the order could not be sent back to the justices to be amended after certiorari proceedings had been taken.

We submit that this order should be made absolute.

(1) 45 J.P. 302, 303.

(2) [1934] N.I. 120, 127.

K.B.D. 1935.

THE KING (McCLAVE) v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

The Attorney-General and *J. G. Dougherty* for the Commissioners of Customs and Excise showed cause against the order :—

We submit the justices have power to amend.

The present case differs from *ex parte Austin* (1). Here the justices amended their order to bring it into harmony with *The King* (*McCaughey*) *v. The Justices of County Tyrone* (2).

The King (*Meehan*) *v. The Chairman and Justices of County Tyrone* (3) is no authority for the proposition contended for on behalf of the prosecutor.

We submit it is necessary that the magistrates should have notice of the challenge to their jurisdiction.

The mere obtaining of a conditional order does not prevent the justices from amending their order.

Until the conditional order is served on the justices the power to amend still exists. This order is not operative until served on the justices. Until the order is formally and officially brought to the notice of the justices they are entitled to amend.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J. : It is very regrettable that neither side has been able to produce any authority.

The magistrates first of all made an order on 12th December, 1934, convicting the prosecutor of the offence of being knowingly concerned in removing certain uncustomed cattle, viz., six bullocks, contrary to section 186 of the Customs Consolidation Act, 1876, whereby he had forfeited the penalty of treble the duty paid value of the cattle, for which the Commissioners of Customs and Excise had elected to sue.

On the 22nd February the prosecutor obtained a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the orders made by the Justices.

Once the conditional order had been obtained the King's Bench Division alone had *seisin* of the matter, and the justices had no power to amend.

The conditional order must be made absolute.

(1) 45 J.P. 302, 303.
(2) [1936] N.I. 10.
(3) [1934] N.I. 120.

BROWN, J.: I agree that the conditional order should be made absolute.

On the 22nd February, the prosecutor obtained a conditional order, the justices were not bound by this order until served with a copy of it. But I think the conditional order having been obtained more than two months after the order convicting the prosecutor had been made, that it was not fair that the prosecutor should be met in this way, so long after the order had been made.

The justices did not amend their order within a reasonable period.

Solicitor for the prosecutor: *Frederick G. Patterson.*

Solicitor for the Commissioners of Customs and Excise: *Chief Crown Solicitor.*

J. McC.

High Court of Justice. 1935.

May 16.

BRADLEY v. McATAMNEY (1).

Descent—Consanguinity—Fee farm grant—Conveyance for value—Death of purchaser intestate leaving widow but no issue surviving—Purchaser's real and personal estate less than £500 in value—Death of widow intestate—Whether heir at law of the husband or heir at law of the wife entitled to possession—Inheritance Act 1833 (3 *&* 4 *Wm.* 4, *c.* 106), *sections* 1, 2—*Intestates' Estates Act*, 1890 (53 *&* 54 *Vict.*, *c.* 29), *sections* 1, 2.

Premises held under a fee farm grant, subject to a yearly rent were conveyed for value to P. B. The purchaser died intestate leaving his widow but no issue surviving. His real and personal estate amounted to less than £500 in value, and all passed under section 1 of the Intestates' Estates Act, 1890, to his widow, who entered into and remained in possession until she died intestate. Thereupon her brother, the defendant, entered into possession as her heir at law. The plaintiff, who was heir at law of her husband, claimed possession, contending that title must be traced from P. B. as the last purchaser. He brought a civil bill for ejectment on the title of the premises.

Held, by Andrews, L.J., affirming the Recorder of L., that the widow acquired the land "otherwise than by descent," and being the last person to do so she was therefore under the Inheritance Act, 1833, the purchaser from whom descent should be traced.

The defendant, the widow's heir at law, was therefore entitled to remain in possession of the premises.

PREMISES held under a fee farm grant of 23rd August, 1907, subject to a yearly rent of £1 6*s.* 0*d.* were conveyed for value to Patrick Bradley in 1927.

Patrick Bradley died intestate on 24th January, 1934, leaving his widow, Hannah Bradley, but no issue surviving.

As his real and personal estate amounted to less than £500 in value, his whole estate passed under section 1 of the Intestates' Estates Act, 1890, to his widow, Hanna Bradley, who remained in possession of the premises until her death intestate on 7th July, 1904.

On her death her brother, Michael McAtamney,

(1) In the High Court of Justice before Andrews, L.J.

entered into possession as her heir at law. The plaintiff, the heir at law of Patrick Bradley, claimed possession contending that title must be traced from Patrick Bradley as the last purchaser.

He brought a civil bill for ejectment on the title, before the Recorder of Londonderry, who dismissed the civil bill, and the plaintiff appealed to the judge of assize.

The appeal was heard by Andrews, L.J., sitting as Judge of Assize, who adjourned the hearing to Belfast where he afterwards gave judgment.

Murphy, K.C., for the plaintiff.

Long for the defendant.

ANDREWS, L.J.

ANDREWS, L.J. : This is an appeal from the Recorder of Londonderry who dismissed the plaintiff's civil bill for ejectment on the title of certain premises situate in Kilrea. The point of law to be determined is a short one ; but its interest lies in the fact that it does not appear ever to have been judicially decided in any reported case.

The premises, which are held under a fee farm grant of 23rd August, 1907, subject to a yearly rent of £1 6s. 0d., were conveyed for value to one Patrick Bradley in the year 1927. Patrick died intestate on 24th January, 1934, leaving his widow, Hannah Bradley, but no issue, him surviving. His real and personal estates were admittedly less than £500 in value, and they all, accordingly, passed under section 1 of The Intestates' Estates Act, 1890, to his widow Hannah, who entered into and remained in possession thereof until her death intestate on 7th July, 1934. Her brother, the defendant Michael McAtamney, is in possession as her heir-at-law. The plaintiff, who is heir-at-law of her husband, Patrick Bradley, claims possession on the ground that, as he contends, title must be traced from Patrick as the last purchaser.

In my opinion the legal issue involved is best determined by considering in the first place the law as it stood prior to the Act of 1890, and, secondly, the effect upon it of the provisions of that Act.

High Court of Justice. 1935.

BRADLEY v. MCATAMNEY.

ANDREWS, L.J.

By section 2 of the Inheritance Act, 1833, it is provided that in every case descent shall be traced from the purchaser, who by section 1 is defined, so far as is material, to be the person who last acquired the land otherwise than by descent. Mr. Murphy's argument on behalf of the plaintiff is in in effect this—that in the technical sense a purchaser is one who acquires land by the lawful act of himself or another, as by conveyance, gift, or devise, as distinguished from one who acquires it by the act of the law, namely, descent. The widow's title was, he argues, acquired under the Act of 1890, i.e., by act of the law, and she was, accordingly, not a purchaser. This argument would carry great weight were it not for the definition of the word "descent," which is also contained in the first section of the Act:—"The word 'descent' shall "mean the title to inherit land by reason of con- "sanguinity. . . ." Now, the very derivation of the word "consanguinity" shows that it means relationship by blood; and the dictionaries make it clear that it is opposed to affinity or relationship by marriage. The "descent" of property is by no means synonymous with the devolution of property. One can no more speak of property "descending" from a husband to a wife than one can refer to a wife as being the "descendant" of her husband. Accordingly, in my opinion the widow did not inherit by descent. She acquired the land "otherwise than by "descent"; and, being the last person to do so, she is under the Act of 1833 the purchaser from whom descent should now be traced.

If I had any doubt upon this point it would be removed by the special words of section 1 of the Intestates' Estates Act, 1890, which provides that the real and personal estates of every man who shall die intestate after 1st September, 1890, leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed £500, belong to his widow absolutely and exclusively. It would be difficult to conceive stronger words for the purpose of conferring a conclusive and indefeasible title; and I find it impossible to reconcile them with

the contention of plaintiff's counsel that the benefit thus conferred upon her, so far as it consists of realty, is lost to her estate if she happens to die intestate, and that it reverts to the estate of her husband. In such event the actual benefit which she or her estate would receive would be less than the £500 ; and this it would be impossible to reconcile in principle with section 2 of the Act, by which, where the net value of the husband's real and personal estate exceeds £500, the widow is declared entitled to £500 "absolutely and "exclusively," and to a charge for that amount upon the whole of such real and personal estates. It has been held in *Cunningham v. Cunningham* (1) and in *In re Dunican, Dunican v. Dunican* (2), that this section gives to the widow merely a charge on the realty in respect of the proportion of the £500 to be borne by such estate, and that she is not entitled to any portion of the real estate in specie. Accordingly, under this section the widow's right to the £500 would be really what the section declares it to be—"absolute "and exclusive," and it would not be in any way affected by the death of the widow intestate. In my opinion the legislature could never have intended that, while the right under section 2 is absolute and indefeasible, the right which is conferred in similar terms by section 1 should be wholly defeated, so far as it related to realty, in the event of the widow dying intestate.

I affirm the dismiss of the learned Recorder with costs.

Solicitors for the plaintiff : *P. J. Agnew & Sons.*
Solicitor for the defendant : *F. J. McKenna.*

J. McC.

(1) [1920] 1 I.R. 119.
(2) [1920] 1 I.R. 212.

C.A.
1935.

Feb. 12.
May 10, 13.

JOHN K. CRAIG v. HAMILL (1)
and
EMILY C. CRAIG v. HAMILL.

Practice—Consolidation—Separate actions by husband and wife for negligence arising out of the same accident—Defence of contributory negligence to husband's claim—Whether two actions should be tried together as one action—R. S. C. Order 49, *rule* 8; *Order 16, rules 1 and 4.*

Two actions for negligence arising out of a motor accident were brought by a husband and wife against the defendant. The husband was driving his own car at the time of the accident and his wife was a passenger in the car. The defence in the first action contained a plea of contributory negligence on the part of the husband, but there was no such plea in the second action.

A motion brought by the defendant for an order that the two actions should be tried together as one action was refused.

The defendant appealed to the Court of Appeal.

Held (Andrews, L.J., dissenting), reversing the order of Moore, L.C.J., that, notwithstanding the plea of contributory negligence in the first action, the two actions could properly be tried together as one action.

Appeal from an order of Moore, L.C.J., refusing a motion brought by the defendant to have two actions tried together as one action.

The affidavit of the plaintiffs' solicitor setting out the facts, which were not contradicted, showed that the actions were brought by husband and wife for injuries sustained by the alleged negligence of the defendant's servant or agent in the driving of a motor van. Both actions were commenced upon the same day through the same solicitor; the pleadings were contemporaneous. The only substantial difference in the pleadings was that the defendant alleged contributory negligence against the husband. It was stated in the affidavit that the same witnesses would be called in both actions by the defendant that the

(1) In the Court of Appeal before Andrews and Best, L.JJ. and Megaw, J.

deponent believed the same witnesses would be called on behalf of both plaintiffs, and that both actions could conveniently and with considerable saving of expense be tried together as one action.

Moore, L.C.J., refused to make an order that both actions should be tried together as one action.

The defendant appealed to the Court of Appeal.

The *Attorney-General* (*A. B. Babington, K.C.*), and *Fox* for the appellant.

In this case a common question of fact forms a common basis of both actions. The plea of contributory negligence by the defendant to the husband's claim is not a sufficient embarrassment to prevent the actions being tried together as one action under Order 49, rule 9.

The Lord Chief Justice would have been disposed to grant the motion but for the fact that he considered that the judgment of this Court in *Brady v. McDonald* (1) precluded him from doing so.

Both actions might originally have been joined on one writ. There can consequently be no substantial objection to consolidating them : *Horwood v. Statesman Publishing Co.* (2) ; *Bailey v. Curzon* (3). If both these claims had been made in one action the Court would, after the pleadings had been closed, be very slow to sever the claims at the instance of a party to the action.

Order 49, rule 9, is to be read in conjunction with Order 16, rule 1, and these rules are to be construed liberally. *Bailey v. Curzon* (3), *Payne v. British Time Recorder Co.* (4).

It would be inconvenient and unnecessarily expensive that the defendant should be required to defend the two actions separately.

Murphy, K.C., and *McSparran* for the respondents.

It has been the settled practice in the Irish Courts not to consolidate actions unless the issues to be tried are precisely similar.

(1) [1931] N.I. 157.
(2) 141 L.T. 54.
(3) [1932] 2 K.B. 392.
(4) [1921] 2 K.B. 1

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

In *Brady v. McDonald* (1), separate actions for negligence were brought by two plaintiffs against the same defendant for damages arising out of the same accident.

The Court of Appeal ordered the actions to be tried together as one action but Andrews, L.J., in delivering judgment said: "It is not, however, to be understood "that the order we are making in this case will "necessarily be made in every case in which two or "more plaintiffs have been injured in the same "accident. It is possible that, although all the "injuries were so received, different issues might "arise, as for example, contributory negligence by "the driver of a motor car, though none by a passenger "in his car."

In *McLean v. Scott* (2), two actions for negligence arising out of a motor accident were brought against one defendant. The defendant pleaded contributory negligence to the first claim but no such plea was raised to the second action. Brown, J., refused a motion brought by the defendant to have the two actions tried together as one action.

[They also referred to *Lee v. Arthur* (3); *Malone v. Great Northern Railway Co. (Ireland)* (4); and *Mann v. Catherwood* (5).]

The plaintiff in the second action, to which there is no defence of contributory negligence, would be embarrassed and unjustly prejudiced if she were compelled to join in an action in which the issue to be determined by the jury is obscured by a plea of contributory negligence.

The Attorney-General replied.

Cur. adv. vult.

ANDREWS, L.J.

ANDREWS, L.J.: In my opinion the order of the Lord Chief Justice in this case should be affirmed. As my opinion differs, I regret to say, from that of my colleagues it can have no effect. At the same time I feel that it is necessary that I should indicate the

(1) [1931] N.I. 157.
(2) [1932] N.I. 212.
(3) 100 L.T. 61.
(4) [1931] I.R. 1.
(5) Unreported.

reasons which have influenced me in coming to the conclusion which I have expressed.

The plaintiffs in these two actions are husband and wife. The husband claims damages for personal injury and for injury to his motor car by reason of the negligence of the defendant in the driving of his motor van. The wife claims damages for personal injuries sustained by her on the same occasion. The husband's car was being driven by himself at the time of the accident which occurred on 15th July, 1934, and his wife was a passenger in the car.

Both writs of summons were issued on the same day —2nd November, 1934—and the pleadings were closed in both actions on 24th December. In his defence to the husband's action the defendant pleads the plaintiff's contributory negligence in the driving of his car. No such plea was open or is to be found in the defence to the action by the wife. On 14th January, 1935, the defendant served a notice of motion entitled in both actions for an order that the two actions be tried together as one action with separate issues as to damages, and that certain consequential directions be given by way of limitation of briefs and counsel. The Lord Chief Justice refused the order sought in deference to the view which he considered was indicated by this Court in *Brady v. McDonald* (1). This is the first reason why, in my opinion, we should be slow to reverse the order of the Lord Chief Justice.

In *Brady v. McDonald* (1), two plaintiffs brought actions in respect of the deaths of their respective husbands caused, as was alleged, by the negligence of the defendant in the driving of his motor car. No question of contributory negligence arose in either case. The defendant sought an order for consolidation, alternatively, for trial together as one action. Following the opinion which we had expressed in *Mann v. Catherwood* (2), we declined to consolidate the actions, and we re-affirmed that this was not in our opinion the proper order to make. We ordered, however, that the two actions should be tried together as one action

(1) [1931] N.I. 157, 160. (2) Not reported.

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

ANDREWS, L.J.

with separate issues as to damages. Having done so we added that it was not to be understood that the order which we were making would necessarily be made in every case in which two or more plaintiffs have been injured in the same action. "It was "possible," we said, "that, although all the injuries "were so received, different issues might arise, as, for "example, contributory negligence by the driver of a "motor car, though none by a passenger in his car." We also referred to cases in which it was conceivable that even conflicting issues might arise which would make it prejudicial to one or both of the parties that they should be forced to litigate in a common action.

Now, whilst I am perfectly clear in my recollection that we never intended to do more by these words than to keep open such cases of contributory negligence and conflicting issues which were not before us for further consideration, and whilst the words which we employed were, in my opinion, adequate and appropriate for that purpose, there can be no doubt that they have been read by both the Lord Chief Justice and Brown, J., and, we are informed, also by other members of the profession as a clear indication of our opinion that such cases should be tried separately. It was for this reason that the Lord Chief Justice refused the motion in the present case, the learned Attorney-General apparently assenting to the construction placed upon our words in *Brady v. McDonald* (1). It was obviously for the same reason that Brown, J., refused a similar application in *McLean v. Scott* (2).

Quite apart however from such considerations, I am clearly of opinion that both as a matter of general principle and also on the special facts of this case the order sought should be refused.

As to the special facts we have here two actions in which the writs of summons were issued on 2nd November, 1934, and the statements of claim were delivered on 16th November, yet the defences were not delivered until 15th December. Further it was not until 14th January, 1935, two days after the service of notice of trial in the wife's action, that the notice of

(1) [1931] N.I. 157. (2) [1932] N.I. 212.

motion was served to have the actions tried together. In my opinion the refusal of the application in circumstances of such delay would be a perfectly reasonable and proper exercise of judicial discretion on the part of any court.

Now on the question of general principle I am aware that my view is in conflict with the present practice of the English Courts, but it accords with the former practice in England and with what, according to my recollection, has been the practice of our Irish Courts. The English practice has been modified and developed in a series of cases in which Scrutton, L.J., was a member of the court. *Lee v. Arthur* (1) well illustrates the former settled practice of the court not to consolidate actions unless the issues to be tried were precisely similar. That case was decided in 1909, thirteen years after the amendment of Order XVI, rule 1, relating to the joinder of plaintiffs, which has been the principal ground relied upon for what Scrutton, L.J., referred to in *Bailey v. Curzon* (2), as a complete change that had taken place within the last twenty years in the attitude of the courts towards the joinder of parties and causes of action on the same writ. The learned Lord Justice's judgment sets out clearly the various steps by which the English Courts proceeded in their journey. "The first step taken by the Court was," he said, "to hold that rule 4 of Order XVI relating to "joinder of defendants covered the same ground as "rule 1 relating to joinder of plaintiffs, notwithstanding "that the words 'arising out of the same transaction or "'series of transactions,' which are included in rule 1, "are not to be found in rule 4. The next step," he says, "was to decide that, notwithstanding certain "decisions limiting the power of joining matters and "parties in one writ, those rules were to be construed "literally, with the result that many matters, formerly "the subject matter of separate actions, could now "be tried in one action." With the greatest respect for the Courts which decided these cases I cannot but think that they were not so much construing the rules as usurping the functions of the statutory rule-making

(1) 100 L.T. 61. (2) [1932] 2 K.B. 392, 397.

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

ANDREWS, L.J.

authority. This led on, however, to the next step in which, as illustrated by *Horwood v. Statesman Publishing Co., Ltd.* (1), and *Bailey v. Curzon* (2), the Courts held that the alteration in these rules relating to the joinder of parties justified a change in the practice relating to consolidation, which, as Scrutton, L.J., said, "affects the litigation at another stage." Hence we find *Horwood v. Statesman Publishing Co. Ltd.* (1) referred to in the Annual Practice (1935), p. 394, as authority for the proposition that where joinder of plaintiffs in one action would be permissible under Order XVI, rule 1, the Court has jurisdiction to consolidate. Accordingly, after the headnote in *Lee v. Arthur* (3) had been discredited in *Horwood v. Statesman Publishing Co., Ltd.* (1), the Court finally declared in *Bailey v. Curzon* (2) that *Lee v. Arthur* (3) had ceased to be a binding authority. I think such a conclusion ignores the fact that the principal reason for the amendment of Order XVI, rules 1 and 4, namely, that a plaintiff would not fall between two stools, does not apply to consolidation. All this was done without any change being made in the consolidation rule, Order 49, rule 8, save the formal immaterial one of the substitution of the words "immediately before the 1st Novem- "ber, 1875," for the words "before the commencement "of the Principal Act." In making this change the Courts were faced with the difficulty that the words of the rule were that "causes or matters pending in "the same Division may be consolidated by order of "the court or a judge *in the manner* in use immediately "before the 1st November, 1875, in the Superior "Courts of Common Law"; but this difficulty was overcome when Scrutton, L.J., held in *Horwood v. Statesman Publishing Co., Ltd.* (1), that these words do not refer to subject matter but only to procedure. I have great difficulty in accepting such an interpretation. This does not seem to me to be the natural meaning of the words, but rather one which places an unreasonable limitation upon them. I much prefer the opinion of Greer, L.J., who, in referring to these words in *Bailey*

(1) 141 L.T. 54.
(2) [1932] 2 K.B. 392.
(3) 100 L.T. 61.

v. Curzon (1) said that it was difficult to suppose that by using the words the framers of this rule were referring merely to the process by which consolidation should be effected, because obviously it could only be brought about in one way, namely, by an order of the Court, and that but for decisions lately given he would have read the rule as providing that an order for consolidation might now be made in the cases in which such an order was made before that date—1st November, 1875.

Here, again, I feel that the construction put upon the rule by the Courts has been an artificial one, and that, if amendment was required, it should have been effected by the rule-making authority.

I do not feel justified in further prolonging this dissenting judgment except to refer to the recent decision of the Supreme Court in the Irish Free State in *Malone v. Great Northern Railway Co.* (*Ireland*) (2), in which the judgment of the Court, which bears evidence of much careful research, was delivered by Fitzgibbon, J. It appears to me to bear out all that I have said in regard to Irish practice in these matters. Referring to *Horwood v. Statesman Publishing Co.*, (3), he said that the Court preferred " to express no opinion " upon it at present." Whilst recognising, as this Court recognised in *Brady v. McDonald* (4), that an order for a simultaneous trial of two or more actions may be made in a proper case, he expressed the opinion in which I heartily concur, that in the absence of consent, it should only be made where there is a substantial saving of expense or inconvenience, and where the issues involved are such that there is no likelihood of confusion or miscarriage. After referring to the fact that this is, of course, far more likely to occur in actions tried with a jury than in those which are heard by a judge alone, the Court declined to make an order for the trial of the nine actions together, as it would effect little real economy of time or expense at the trial, while it would almost certainly give rise to confusion and miscarriage with their attendant expense of subse-

(1) [1932] 2 K.B. 392, 400.
(2) [1931] I.R. 1.
(3) 141 L.T. 54.
(4) [1931] N.I. 157.

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

ANDREWS, L.J.

quent litigation. In the result the Court made an order that all the actions except two should be stayed pending the trial of the two selected actions on certain conditions which were mentioned, one being a case in which contributory negligence was pleaded, and the other a case in which it was not. The Court obviously considered it improper that a party against whom contributory negligence was not pleaded should be forced to have his rights determined in an action in which it was pleaded. Such actions are not instituted vexatiously or oppressively. Their joinder may lead to embarrassment and injustice. Why should a party who has only to establish negligence on the part of the defendant be compelled to take his trial in an action in which the thorny and difficult problem of contributory negligence arises for determination ? I can foresee the possibility of much resulting prejudice, and the balance of inconvenience and possible injustice is, in my opinion, against such a joinder.

We have already departed in this Court from the English practice of making a consolidation order, and have substituted for it in a proper case the order, which was so frequently made in Dublin, for the trial of actions together as one action. In these circumstances I am unable to see why in this matter we should feel bound to follow a recently developed English practice which conflicts with one which has long been settled in this country, and which, in my opinion, should stand until the Statutory Rules Committee may deem it proper to make the appropriate amendment for the purpose in the provisions of Order 49, rule 8.

BEST, L.J.

BEST, L.J. : This matter comes before us by way of appeal from an order of the Lord Chief Justice, dated 25th January, 1935, refusing with costs the motion of the defendant that the above two actions be tried as one action with separate issues as to damages (if any) or otherwise in each case, and with one set of briefs for the respective plaintiffs, and one set of briefs for the defendant, with the same counsel representing the respective plaintiffs and the same counsel representing the defendant, and that the costs of the motion be costs in the cause.

The actions are brought by the plaintiffs, who are husband and wife, against the defendant for damages, (*a*) in the case of the husband for personal injuries and injuries to his motor car for which the claim is £250, and (*b*) in the case of the wife for personal injuries, the sum claimed being £1,500, the allegation in each case being that the injuries were caused by the negligence of the defendant's servant or agent in driving the defendant's motor van.

The plaintiff, whilst accompanied by his wife, was driving his motor car on 15th July, 1934, along the public road which runs between Portrush and Coleraine, and it is alleged that defendant's van was so negligently driven by his agent and servant as to cause the injuries complained of in each action.

The writ in each case was issued on 2nd November, 1934, the husband's being issued immediately before that of his wife. The two writs were issued by the same firm of solicitors.

An appearance to each writ was entered by defendant's solicitors (Messrs. C. & H. Jefferson) on 12th November.

On 16th November a statement of claim was delivered in each case.

These statements of claim are identical as to the facts giving rise to each action, and differ only as to the damages sustained by each of the plaintiffs.

On 19th November, defendant's solicitors served a notice in each case requiring further and better particulars in writing of the matters relied on in the statement of claim, and those particulars were asked for under four different heads.

An answer to each notice, dated 21st November, was served, and as regards the negligence alleged the answers are in identical terms.

A statement of defence in each action was delivered on 15th December, and the only difference in the defences in the two cases is that contributory negligence is alleged against the male plaintiff, who was driving his own car. The reply in each case was delivered on 24th December, and consisted of a joinder of issue with the additional plea in the case of the male plaintiff

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

BEST, L.J.

that if he were guilty of the negligence alleged, which was denied, nevertheless the defendant could by the exercise of reasonable care and diligence have avoided causing to the plaintiff the injuries complained of.

Notice of trial for 23rd January, 1935, by a judge and common jury of the action in which Emily C. Craig is plaintiff, was served on 12th January, 1935, and on 14th January, the defendant served notice requiring the action to be tried by a special jury, and on the same date notice of the motion with which we are now concerned was served upon the solicitors for the plaintiffs.

The only affidavit used on the motion before the Lord Chief Justice was one sworn by Mr. Harold Jefferson, who practises as C. & H. Jefferson, solicitors for the defendant in the two actions.

He sets out very shortly the facts giving rise to the actions, and refers to the pleadings and says that he tendered to the solicitors for the plaintiffs a consent to have both actions tried as one action but that they refused to sign the consent. He further says he believes that the same witnesses will be called on behalf of both plaintiffs, and the same witnesses will be called by defendant for his defence to each action. He says that both actions could conveniently and with considerable saving of expense be tried together as one action, with separate issues as to damages, or otherwise, and he asks the Court for an order that the actions should be so tried.

The motion having been opened before the Lord Chief Justice, and the case of *Brady v. McDonald* (1), having with other cases been cited, it was suggested to the learned judge that having regard to the decision of this Court in *Brady v. McDonald* (1), he was bound to refuse the motion, which he did with costs.

From this decision the present appeal is taken.

It is necessary to consider what was decided in the case just mentioned, and what bearing that decision has on the case before us. There two plaintiffs had brought separate actions, each bringing an action in respect of the death of her husband against the

(1) [1931] N.I. 157.

defendant for damages caused by his negligence in the driving and management of a motor car. Both actions arose out of the same accident, the two deceased being passengers when it occurred, and the plaintiffs were represented by different solicitors. An application was made on behalf of the defendant to the King's Bench Division for an order that the actions should be consolidated or, alternatively, that they should be tried together as one action, with separate issues as to damages. The Lord Chief Justice who heard the motion did not order either of these courses to be taken but did order that the actions should be tried together before the same judge and jury with separate relative issues. The defendant having appealed against the order so made, this Court, consisting of Andrews, L.J., and myself, varied the order made by the Lord Chief Justice, by directing that the actions should be tried together as one action with separate issues as to damages, and in the event of the plaintiffs obtaining verdicts, one set of trial costs only should be allowed to them, such costs in default of agreement to be divided equally between them.

Having heard the arguments in the case, and having conferred together, judgment was delivered by my Brother Andrews, but as it was intended to be and was in fact the judgment of the Court I must and do take full responsibility for what was really decided by it.

Having stated what we considered the proper order to make in the case, the judgment proceeded (p. 160). "It is not, however, to be understood that the order "we are making in this case will necessarily be made "in every case in which two or more plaintiffs have "been injured in the same accident. It is possible "that, although all the injuries were so received, "different issues might arise, as for example, con-"tributory negligence by the driver of a motor car, "though none by a passenger in his car." Then the judgment goes on to refer to the possibility of other issues arising which would make it prejudicial to one or both of the parties that they should be forced to litigate together in a common action.

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

BEST, L.J.

The case decided no more than this—that in the circumstances then before the Court it was proper that the two actions should be tried together, but it did not decide that where contributory negligence is pleaded in one of two actions arising out of the same set of facts but can not be pleaded in the other this difference of itself requires the actions to be tried separately, just as it did not decide that two such actions should be tried together. In fact it decided nothing as to what should properly be done where contributory negligence is pleaded against one plaintiff and not against another in actions of the kind now under consideration, but left the question quite open. Notwithstanding this, it appears that learned Counsel for the plaintiffs in the cases of *McLean v. Scott* and *Howarth v. Scott* (1), made use of the argument (see p. 213) that it is clear on reading the judgment in *Brady v. McDonald* (2) that Andrews, L.J., took the view in such circumstances that the Court would not order the actions to be tried concurrently (which, I presume, means being tried together) as one action, and this submission of Counsel appears to have been acted upon by the learned judge, Brown, J., who ordered the two actions to be tried separately.

I do not know whether my Brother Andrews held the view attributed to him by Counsel, but however that may be I did not hold and do not now hold any such view and I regard myself as free notwithstanding the dictum in *Brady v. McDonald* (2) to consider what in the circumstances of the present case is the proper order to make. Here the facts giving rise to the two actions are identically the same in the one case with what they are in the other, there is no suggestion that any conflict of interest can reasonably be expected to arise between the two plaintiffs, it is not suggested that there is or can be any hostility between them in the presentation of their respective cases, and, except by Mr. Murphy in his able argument, it is not suggested that any injustice will or may be done to either plaintiff by having the actions tried together. And what does Mr. Murphy's argument on the question

(1) [1932] N.I. 212. (2) [1931] N.I. 157.

of possible injustice to the female plaintiff amount to ? Is it any more than this, that because difficulties arise in explaining to juries what is meant by contributory negligence the lady's chance or expectation of obtaining a clean verdict may be imperilled ? I cannot believe that any jury, and more particularly a special jury of the City of Belfast, will have any real or appreciable difficulty in distinguishing, and trying without risk of confusion, the issues which are to be tried in the two cases, or that the female plaintiff runs any risk whatever of not getting justice done to her particularly as the one crucial question in the case of her action is whether there was negligence on the part of the defendant which caused, or helped to cause, the injuries of which she complains.

Once that question is decided in her favour, and if it should not be decided in her favour she cannot obtain a verdict, it is a matter of no consequence to the success of her action how the jury may deal with the question of the alleged contributory negligence of her husband.

That there will be a saving of expense in having one trial instead of two can scarcely be questioned, and I see no possible risk of an injustice being done to either plaintiff by having the two actions tried as one.

I arrive at the conclusion that justice will be done by having the two actions tried as one all the more readily from the conviction that the learned Lord Chief Justice would have granted defendant's motion if he had not thought that out of regard to our decision in the case of *Brady v. McDonald* (1) he was bound to refuse it.

In my opinion defendant is entitled to have his motion granted in the terms in which it was asked for in his notice of motion, and we make the defendant's costs of the said motion of 25th January and of this appeal part of the costs in the action.

MEGAW, J.

MEGAW, J.: This appeal is concerned with the proper interpretation of Order XLIX, rule 9, in regard to the hearing of two actions which arise out of a single

(1) [1931] N.I. 157.

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

MEGAW, J.

incident. The question at issue is really whether the two actions are to be heard at the one time, or whether, in case both are pushed to a hearing, the same speeches, evidence and to a large extent the same or a like charge by the judge or judges is to be repeated.

The facts are set out in the affidavit of Mr. Harold Jefferson and these have not been refuted. This affidavit shows that the actions are brought by husband and wife, John K. Craig and Emily Cathcart Craig, for injuries they have sustained by the alleged negligence of the defendant, his servant or agent, in the driving of a motor van. The actions were commenced on the same day through the same solicitor, the pleadings in both were contemporaneous. In substance the only difference in the pleadings is that the defendant alleges contributory negligence against the husband. It is stated in the affidavit that the same witnesses will be called in both actions by the defendant, that deponent believes the same witnesses will be called on behalf of both plaintiffs, and that both actions could conveniently and with considerable saving of expense be tried together as one action.

The motion to have the actions tried together as one action was only instituted after the notice of trial had been served by Mrs. Emily Craig, who for the first time took a separate initiative.

This motion came before the Lord Chief Justice and so far as the facts had been presented to him, I am satisfied that he would have granted the motion but for the fact that he formed the opinion that the judgment of this Court in *Brady v. McDonald* (1) precluded him from doing so. The words in the judgment of Andrews, L.J., who delivered the judgment of the Court, were :—" It is not, however, to be understood " that the order we are making in this case will " necessarily be made in every case in which two or " more plaintiffs have been injured in the same " accident. It is possible that, although all the " injuries were so received, different issues might arise, " as for example, contributory negligence by the driver " of a motor car, though none by a passenger in his

(1) [1931] N.I. 157.

"car." It was admitted fairly by Mr. Murphy that this expression did not declare that in every case where contributory negligence was pleaded in one action and not in another an order for their being heard together could not be made. He contended, however, in favour of the principle that in such cases nothing in the nature of consolidation should be ordered. As he put it, the allegation of contributory negligence was in itself a sufficient reason against ordering consolidation *in invitum*. He relied most strongly on the point that as a matter of discretion the motion should have been refused by reason of the fact that it had only been instituted when the notice for trial of one of the actions had been served.

Rules of Court are made to provide the best way by which justice may be administered between parties, with the highest degree of accuracy, with expedition, and as economically as possible.

In the present proceedings it is absolutely clear that both claims might have been brought under Order XVI, rule 1, in one action—and I can hardly fancy a case at common law to which the provisions of this rule would be more relevant. We have here a motor car collision in which persons in the relationship of husband and wife living under the same roof are involved. Both go to have redress to the same solicitor, who issues separate writs in identical terms, delivers identical statements of claim, identical particulars of negligence, and the pleadings are closed on the same day in each case.

I pause here to ask the question: Supposing the respective claims had been joined by the plaintiffs in one writ, would any Court, in the circumstances after the pleadings had been closed in these issues, have, at the instance of any of the parties, severed the claims and directed them to be tried separately? I think that unless some other factors supervened no such severance would be ordered.

The decisions of the English Court of Appeal to which Scrutton, L.J., was a party, *Horwood v. Statesman Publishing Co.* (1), *Bailey v. Curzon* (2), and *Payne*

(1) 141 L.T. 54. (2) [1932] 2 K.B. 392

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

MEGAW, J.

v. British Time Recordor Co. (1), show that the rules are to be construed liberally, that Order XLIX, rule 8, corresponding to rule 9, is to be taken in conjunction with Order XVI, rule 1, and that the old practice in regard to joinder of actions has been departed from. Our rules on the subject are indistinguishable from the English. Now it seems to me that the decisions I have referred to are in complete harmony with the decision of the Lord Justices in this Court in *Brady v. McDonald* (2). No doubt the old Irish practice was different, but the more liberal interpretation expressed in the later English cases and in *Brady v. McDonald* (2), seems to me more in accordance with the wording of the rules, and, with due respect, I am of opinion that this more liberal interpretation is more consistent with the intentions of the Legislature in the Judicature Act and with the efficient and economical administration of justice than the rigid observance of the old practice.

I cannot see how either of the plaintiffs would be embarrassed by the hearing of their claims as one action. The trial judge will have no difficulty in explaining the different issues, and if a jury has not the intelligence to understand what it has to try in the case where no contributory negligence is alleged, I don't think its verdict in any part of the case would be of much value. As I pointed out at the hearing, if one of the plaintiffs felt that a jury would be embarrassed, I am sure he could easily have had a trial by a judge without a jury. Indeed it seems to me that if a single trial of the two actions could not be ordered here, the rule which permits the Court to make an order would be a dead letter.

Accordingly, I am of opinion that the learned Lord Chief Justice was mistaken in regarding the qualification suggested in *Brady v. McDonald* (2), as a binding decision that an order such as the present could not be given because contributory negligence was pleaded. It is only because I am convinced that this was the basis of his decision that I venture to differ from it.

In my opinion, unless some point of general principle is involved, the discretion of a trial judge as to the

(1) [1921] 2 K.B. 1. (2) [1931] N.I. 157.

hearing of actions should not be interfered with. The learned Lord Chief Justice in the present case, considering that the decision of *Brady v. McDonald* (1) concluded the matter, decided the motion on that ground and took no other circumstances into account. We must therefore consider the motion on its merits and see whether the motion is sustainable in the circumstances that are apparent on the evidence and in the various steps of the proceedings in the actions, having regard to the consideration that multiplicity of proceedings where a single action can do justice should be discouraged. The only special circumstance put forward by the plaintiffs in these cases, apart from the question of contributory negligence, which I have already dealt with, is based on the delay in bringing the motion. This is a circumstance which must have an important bearing on the decision as to whether such a motion as the present should be granted, and a judge in exercising his discretion must have regard to the time when the motion was instituted, and see that parties are not prejudiced by reason of delay. No doubt there exists a jurisdiction of making such an order as is sought here at any time before the hearing. If I saw, however, that the plaintiffs in either action would be prejudiced in any way by the defendant's remissness, I should not entertain the application. No suggestion of any embarrassment or prejudice has been made on affidavit, and Mr. Murphy's attempts to suggest any injustice were not convincing. The defendant's proper course, no doubt, would have been to have instituted the motion at least as soon as the pleadings were closed and the issues apparent. However, when one looks at the dates in these actions it is to be seen that the replies were delivered on 24th December. The Christmas vacation then intervened, so that there was perhaps some excuse for the delay. I do not think that it was so great as to be a bar to the success of the motion, and, as I have said, the plaintiffs have not shown by affidavit or otherwise

(1) [1931] N.I. 157.

C.A. 1935.

JOHN K. CRAIG v. HAMILL and EMILY C. CRAIG v. HAMILL.

MEGAW, J.

that they will suffer any harm by the delay other than may arise on the question of costs.

Solicitors for the appellant: *C. & H. Jefferson.*
Solicitors for the respondent: *D. MacLaughlin & Sons.*

J.R.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED).

AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932 (1).

Ch. Div. 1934.
June 24, July 30, Nov. 12.

Ch.Div. 1935.
April 30, June 6.

Company—Association not for Profit—Alteration of Objects in Memorandum—Confirmation by Court—Jurisdiction—Consent of Ministry of Commerce—Trust—Cy-Près—Functions of Ministry of Commerce—Companies Act (Northern Ireland), 1932 (22 & 23 *Geo.* 5, *c.* 7) *sections* 5, 18 (1) *and* 112—*The Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *section* 20.

A company registered under section 18 (1) of the Companies Act (Northern Ireland), 1932, by licence of the Ministry of Commerce, as a company for promoting a charitable object with limited liability but without the addition to its name of the word "limited" cannot extend the objects in its memorandum under section 5 of the said Act where the change in the objects is of a substantial character unless circumstances appear in which the doctrine of *cy-près* would be applicable and the principles of *cy-près* should be followed in the consideration of any such application.

PETITION brought for the confirmation of a special resolution passed by the petitioning Society for the purpose of altering the Society's objects, under section 5 of the Companies Act (Northern Ireland), 1932.

The Society had been registered under the Companies Act (Northern Ireland), 1932, having satisfied the Ministry of Commerce that it complied with the conditions under which the necessity for the use of the word "limited" should be dispensed with. The objects of the Society set out in the memorandum of association contained the following:—

"(1) To obtain justice for animals and to endeavour by every legitimate means to put an end to cruelty.

"(3) To take over and accept by way of gift or otherwise from the existing Society known as 'the Ulster Society for Prevention of Cruelty to

(1) In the Chancery Division before Megaw, J.

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

" 'Animals,' or from any trustee or trustees on " their behalf, or from any other person or persons, " the whole or such part as may legally be trans- " ferred to the Society of the assets and property " belonging to the said unincorporated Society and " in particular the stocks, funds and securities " hereunder mentioned, and the investments for the " time being representing the same upon the trusts " declared by a deed poll, dated 6th day of February, " 1917, with power to vary such investments from " time to time ; and further to undertake all or any " of the liabilities of the said unincorporated Society, " including the costs of incorporation.

" (8) To consider all questions affecting the " interests of animals and to initiate and watch over " and, if necessary, to petition Parliament or " promote deputations in relation to general measures " affecting animals.

" (15) To do all such other lawful things as are " incidental or conducive to the attainment of the " above objects, or any of them."

The memorandum also contained the clauses and provisoes necessary to enable it to be registered as an association not for profit without requiring the use of the word " limited."

The special resolution for which the confirmation of the Court was sought was passed at a meeting of the Society on 6th June, 1934, and was as follows :—

" That the provisions of the Society's memorandum " of association with respect to its objects be altered " by inserting therein immediately after paragraph 4 " of clause 3 of the memorandum the following " paragraph :—

" (4) (*e*) To establish and maintain in Northern " Ireland a general hospital for medical and " surgical treatment of animals, such hospital to " be a public, charitable, or benevolent institution, " the primary object of which is to relieve all " animal suffering and to have the following " essential features :—

" (i) No vivisector or vivisectionist shall be " employed in the management of the hospital,

"or in its medical, surgical or administrative "staff.

"(ii) Vivisection in any form shall not be "practised.

"For the purposes of this sub-clause the term "'vivisection' shall include any medical, surgical "or scientific experiment or treatment of whatso- "ever nature (whether with or without anæsthetics) "upon a living creature the purpose of which is "not to benefit the individual creature upon which "it is inflicted."

It was stated in the petition that the extension of the objects was required to enable the Society to undertake a form of activity which it was submitted could be properly and conveniently combined with the other activities of the Society.

The petition further set out that the Society was in a good financial position, that no one would be prejudiced by the proposed extension of the Society's objects and that it was just and equitable that the said special resolution for the proposed extension of such objects should be confirmed.

Black, *K.C.*, and *Johnson* for the petitioners:—

Section 5 (1) (*d*) of the Companies Act (Northern Ireland), 1932, provides that a company, may by special resolution alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company. By section 18 (1) of this Act where it is proved to the satisfaction of the Ministry of Commerce that an association about to be formed as a limited company is to be formed for promoting charity it may be registered as a company with limited liability, without the addition of the word "limited" to its name. And, by sub-section 3 of that section, the association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations. Under this last sub-section it is

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

clearly intended that all the provisions of the Companies Acts shall apply and one of these provisions is the power to extend objects with the approval of the Court. In *In re St. Hilda's Incorporated College, Cheltenham* (1), it was held that where a company registered under section 23 of the Companies Act, 1867, by licence of the Board of Trade, as a company not for the purposes of gain, with limited liability but without the addition to its name of the word "Limited," desires to alter its memorandum of association, the proper course is to apply in the first instance to the Board of Trade, and submit to the Board the memorandum shewing all the proposed alterations; and if the Board approve them as being consistent with the continuation of the licence the Court will then entertain the application of the Company for the sanction of the Court to the alterations. In *Incorporated Glasgow Dental Hospital v. Lord Advocate* (2), where a dental association, which had been instituted for benevolent purposes, and had been incorporated under the Companies Acts, presented a petition for confirmation of an alteration of its memorandum of association, one effect of which was to increase the number of paid members of its governing body from three to five. This involved an alteration of a clause in its memorandum other than the "objects" clause. The petition was granted as the proposed alteration was designed for the better attainment of the objects of the association. [They also referred to *In re Society for Promoting Employment of Women* (3) and *Kircaldy Cafe Co., Ltd.* (4).

Any contributor to the Society's funds, contributed to a society the objects clause of which might be altered in certain circumstances, *e.g.*, on a special resolution of the Society confirmed by the Court—and he must be taken as recognising that such an alteration might take place—is specially bound, if having the opportunity to oppose, he makes no representations to the Court. In *Pepe v. City and Suburban Permanent Building Society* (5), the plaintiff was the holder of

(1) [1901] 1 Ch. 556.
(2) [1927] S.C. 400.
(3) [1927] W.N. 145.
(4) [1921] S.C. 681.
(5) [1893] 2 Ch. 311.

four fully paid up shares in a building society. By one of the rules of the society a member on giving one month's notice in writing might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. The plaintiff gave the requisite notice of withdrawal; but after such notice and before he was repaid the above rule was altered by giving the directors power to pay off in priority members holding less than £50 in the society. It was held that although the plaintiff had at the date of his notice of withdrawal under the rule then in force a vested right to be paid the amount due on his shares, he, still being a member of the society, was liable to have his right divested by a subsequent alteration in the rule duly made, and that he was therefore bound by the altered rule. In *Shuttleworth v. Cox Bros. & Co. (Maidenhead), Ltd. and Others* (1), it was held that it is for the shareholders and not for the Court to say whether an alteration under section 13 of the Companies Act, 1908 (which corresponds to section 18 of the Companies Act (Northern Ireland), 1932) is for the benefit of the company, provided that it is not of such a character as that no reasonable men could so regard it.

The power to alter the objects clause by permitting additional businesses to be carried on with the existing business of a company is liberally construed. *In re Patent Tyre Co., Ltd.* (2).

The Attorney General (A. B. Babington, K.C.) and *J. G. Dougherty* :—

In re St. Hilda's Incorporated College, Cheltenham (3), is not an authority upon the point raised in this case. The object was not charitable in the ordinary sense and there was consequently no appearance by the Attorney General. The matter considered by the Court was merely a question of what was the proper procedure to be adopted in such cases. The report contains no suggestion of any substantial alterations in the objects contained in the memorandum of association.

(1) [1927] 2 K.B. 9.
(2) [1923] 2 Ch. 222.
(3) [1901] 1 Ch. 556.

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

Section 18 of the Act of 1932 is entirely in the future. It was intended by the legislature to apply to charities which were about to be formed. The legislature never contemplated that a charity in being should become a company. Where that is done the company must take it upon the identical trusts and subject to all the duties and liabilities of the former Society. Alterations of the substantial nature asked for by the petitioners could only be granted upon a *cy-près* application of the trust funds on a total failure of the charitable objects. The Court has no greater right to sanction alterations in the trusts to be carried out by such companies than it would have where the trusts were administered by individual trustees.

Black, K.C., replied.

Cur. adv. vult.

MEGAW, J.

June 6.

MEGAW, J.: This is a petition which involves the consideration of some interesting points.

It was brought for the confirmation of a special resolution passed by the petitioning Society for the purpose of altering the Society's objects, under section 5 of the Companies Act (Northern Ireland), 1932.

The Society has been registered under that Act, having satisfied the Ministry of Commerce that it complied with the conditions by which the necessity for the use of the word "limited" should be dispensed with. Among the objects of the Society set out in their memorandum of association are:—

(1) To obtain justice for animals and to endeavour by every legitimate means to put an end to cruelty.

(2) For the above purposes (but as regards real and leasehold property only so far as the law and the licence of the Ministry of Commerce for Northern Ireland may from time to time allow) to accept purchase, acquire, hold, manage, improve, sell, demise, let in fee farm, exchange, mortgage or dispose of any lands for any estate or interest therein, and either with or without buildings thereon, and any other hereditaments,

corporeal or incorporeal, and to accept (with or without conditions) and hold gifts, devises and bequests of real and personal property, and to collect and receive money by voluntary contributions, collections, subscriptions, donations, legacies and payments by public bodies and others, and to hold bazaars, sales of work, or other similar efforts and to buy, sell, and deal in all kinds of goods, chattels, animals and birds.

(3) To take over and accept by way of gift or otherwise from the existing unincorporated Society known as "The Ulster Society for Prevention of Cruelty to Animals" or from any trustee or trustees on their behalf, or from any other person or persons, the whole or such part as may *legally* be transferred to the Society of the assets and property belonging to the said unincorporated Society and in particular the stocks, funds and securities hereunder mentioned, and the investments for the time being representing the same upon the Trusts declared by a Deed Poll, dated the 6th day of February, 1917, with power to vary such investments from time to time; and further to undertake all or any of the liabilities of the said unincorporated Society including the cost of incorporation. The following are the stocks, funds and securities hereinbefore mentioned:—

£4,457 £5% War Loan Stock 1929/47.
£1,900 Belfast Harbour Commissioners 3½% Stock.
£1,625 London Midland & Scottish Railway Co. 4% Preference Stock.
£250 Belfast City and District Water Commissioners 3½% Stock, 1938.
£50 Belfast City and District Water Commissioners 3½% Stock, 1963.
£1,000 Belfast City and District Water Commissioners 3% Stock.
£50 Tate & Lyle 4½% 1st Mortgage Debenture Stock.

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

MEGAW, J.

(8) To consider all questions affecting the interests of animals and to initiate and watch over and if necessary to petition Parliament or promote deputations in relation to general measures affecting animals.

(15) To do all such other lawful things as are incidental or conducive to the attainment of the above objects, or any of them.

The memorandum also contains the clauses and provisoes necessary to enable it to be registered as an association not for profit without requiring the use of the word "limited."

At this stage let me say that I am of opinion that this statement of the objects should be construed in a wide sense. Clauses (3) and (15) will call for special notice later.

The special resolution for which the confirmation of the Court is sought was passed at a meeting of the Society on 6th June, 1934, and is as follows :—

"That the provisions of the Society's memorandum "of association with respect to its objects be altered "by inserting therein immediately after paragraph 4 "of clause 3 of the memorandum the following "paragraph, namely :—

"(4) (*e*) To establish and maintain in Northern "Ireland a general hospital for medical and "surgical treatment of animals, such hospital to "be a public, charitable, or benevolent institution, "the primary object of which is to relieve all "animal suffering and to have the following "essential features :—

"(i) No vivisector or vivisectionist shall be "employed in the management of the "hospital, or on its medical, surgical, "or administrative staff.

"(ii) Vivisection in any form shall not be "practised.

"For the purposes of this sub-clause the term "'vivisection' shall include any medical, surgical "or scientific experiment or treatment of whatso- "ever nature (whether with or without anæs- "thetics) upon a living creature the purpose of

"which is not to benefit the individual creature "upon which it is inflicted."

It is stated in the petition that the extension of the objects is required to enable the Society to undertake a form of activity which it is submitted can properly and conveniently be combined with the other activities of the Society, and goes on to state that it is apprehended that on the true construction of the memorandum of association the objects set forth in the said special resolution did appear to fall within the words of paragraph 15 of clause 3 of the said memorandum of association, namely :—"To do all such other lawful "things as are incidental or conducive to the attain- "ment of the above objects or any of them" but that it is desirable to preclude any question or doubt on the matter.

After setting out that the Society is in a good financial position the petition also sets out that no one will be prejudiced by the proposed extension of the Society's objects and that "it is just and equitable "that the said special resolution for the proposed "extension of such objects be confirmed."

The petition was dated 8th June, 1934, and was supported by an affidavit made by William Peoples Black, the treasurer of the Society.

It first came before the Court for direction on 26th June, 1934. The facts brought to the notice of the Court were certainly very meagre. The terms of the petition were verified. The certificate of incorporation, the memorandum and articles of association of the Society were exhibited. Proof was given that the general meeting was duly convened and that the special resolution was duly passed complying with section 112 of the Companies Act (Northern Ireland), 1932, and it also appeared that the Ministry of Commerce for Northern Ireland approved of the proposed extension of the objects of the Society, and the correspondence with that Ministry was exhibited.

While counsel for the Society did not say so in so many words, he gave me the impression that his contention was that so long as the Ministry of Commerce was satisfied, the function of the Court was

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

MEGAW, J.

confined to preserving the interests of creditors. It seemed to me that the application was rather an unusual one affecting the interests of charities, and while I suggested that it might be well to serve the Attorney General before the hearing, I made no order to that effect but merely directed advertisements and fixed a time for hearing the petition.

When the petition came on for hearing on 31st July, I found that my suggestion had not been acted on, and the case for the petition was opened without any appearance other than junior counsel for the petitioners.

The gist of the case for the petitioners was that when an association had been formed under section 18 of the Companies Act (Northern Ireland), 1932 (or the previously existing section 20 of the Companies Consolidation Act, 1908), if it secured the licence of the Ministry of Commerce under section 18 of the Companies Act (Northern Ireland), 1932, the same conditions of altering its memorandum under section 5 of the Companies Act (Northern Ireland), 1932, applied to such association as were applicable to an ordinary commercial company, and that the requirements of sub-section 3 of that section were all that the Court was concerned with as necessary for giving its sanction to the alteration or extension of the objects set out in the memorandum.

This seemed to me to be a very far-reaching proposition as regards the administration of charities, and I adjourned the hearing having given a direction that the Attorney General should be served.

It came on again for hearing on 12th November, 1934, when counsel for the Attorney General appeared and senior counsel had been brought in for the petitioners. The question of the applicability of the sections of the Companies Act to charities which I had raised was ably argued, and for the first time the contents of the deed of 6th February, 1917, referred to in clause 3 (3) of the memorandum of association, was produced to the Court though it was not an exhibit. It was then clear that this Court had not sufficient material to deal with the issues involved, and I adjourned the case generally, stating that full

information must be given as to the history of the Society before the incorporation of the petitioners, that the trust deed should be put in evidence, and that a copy of this and the evidence of the previous trusts with a statement in relation to the funds should be available for the Court and should be submitted to the Attorney General before the hearing. These requirements were thoroughly carried out and the affidavit of Mrs. Holmes and the exhibits furnish all materials available for the consideration of the Court, presenting a striking contrast to the information originally given.

There seem to me to be three points to consider in regard to a petition of this nature. First, whether an application such as the present where charities are concerned falls within section 5 of the Companies Act, and, if so, (2) whether the considerations set out in sub-section 3 are to be the guiding factors in exercising its functions as to confirming the alteration. If not, (3) what are the principles that should guide the Court in dealing with extending the object of charities.

Let me say in the first place that I do not think that the functions or duties of the Board of Trade in England or the Ministry of Commerce in Northern Ireland are concerned with more than seeing that the conditions of the sections by which provision is made for registering or continuing the registration of companies where liability is limited and dispensation of the use of the word "limited" in the title of the particular association is concerned are complied with. That Ministry must see that the statutory requirements of sections 18 and 19 of the Act are not infringed, but in my opinion, the Ministry of Commerce in this country has no jurisdiction to give sanction to the alteration of the objects of a charitable association, though it must determine whether the objects original or altered entitle the particular association to the benefits of section 18, and I decline to read its approval of the draft clause given in the letter of 30th June, 1933, as having any other effect. The Ministry of Commerce, no doubt, must be served with the petition

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

MEGAW, J.

in a case like the present. This, I think, is clear from the case of *In re St. Hilda's Incorporated College, Cheltenham* (1).

I do not see that there is any actual authority showing the attitude a Court should take in a case like the present where it is sought to alter the objects of a charity under the provisions of section 5 of the Companies Act (Northern Ireland), 1932, corresponding to section 20 of the 1908 Act. I have been referred to *In re St. Hilda's Incorporated College, Cheltenham* (1). There was no appearance in that case by the Attorney General, and so far as I can see from the report the matter considered by the Court was the question of procedure. There is no reference to the contents of the memorandum as regards the objects of the association, and I should think the question was more directed to improved means of carrying out the objects than to approve of any alterations of a substantial character in them.

It is an authority, however, for the contention that the Court may entertain an application to alter the memorandum of an association registered under section 18 of the Act. Whether the educational scheme then coming under the investigation of the Court was a charity or not does not appear. I can hardly think it was, otherwise the Attorney General would seem to me to have been a necessary party.

On the whole, however, I think that this Court in a proper case can sanction the alteration of a memorandum of an association registered under section 18 of the Act, but I do not think that it has any greater rights with regard to altering trusts than it would have where trusts were administered by individual trustees. An association coming within section 18 in circumstances like the present is really an incorporated body of trustees, and in my opinion, while matters regarding it as a corporate body fall within the scope of the Companies Act, its administration of the trusts for which it is incorporated is governed by the ordinary law affecting trusts.

If the contention of the petitioners were sound, trustees of any charity would have power to defeat

(1) [1901] 1 Ch. 556.

the obligations of their trust by getting incorporated with the sanction of a Ministry whose officials, however they might be versed in commercial or financial matters, can hardly be supposed to be trained in the somewhat complex law of trusts, and then altering the trusts in a way that may be entirely at variance with the original trusts.

It seems to me, therefore, that a Court of Equity is not confined to satisfying itself as to the matters specified under sub-section 3, and that the substantive law as to charities must be applied in application to alter memorandum of association just as in cases where charities are controlled by individuals.

If I am correct in this view, a Court of Equity should interpret sub-section 4 so that the terms and conditions to be applied should, in cases like the present, be governed by the established law where alterations of a trust are confined to *cy-près* administration.

Now let me consider the facts in the present case. I am much indebted to the very full affidavit of Mrs. Holmes for the history of the movements for prevention of cruelty to animals previous to the incorporation of the present Society—a history which seems to me to be of great importance in forming a conclusion in these proceedings.

It would appear that a century ago a Society was formed in Belfast under the title of "The Belfast "Society for Prevention of Cruelty to Animals," and that this Society was a branch of the London Society formed in 1824 and known from 1840 as "The Royal "Society for the Prevention of Cruelty to Animals." The object of the London Society as appears from a private Act of Parliament 22 & 23 Geo. V. cxxxix, was "the mitigation of animal suffering and the promotion "and expansion of the practice of humanity towards "the inferior classes of animated beings." I may at this point observe that in this Act of Parliament the objects of the Royal Society for the Prevention of Cruelty to Animals are set out as follows:—"To "promote kindness and to prevent or suppress cruelty "to animals and to do all such lawful acts as the "Society may consider to be conducive or incidental "to the attainment of those objects."

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

MEGAW, J.

The Belfast Society seems to have been financially independent of the Royal Society but the earliest reports of the Society support the theory that it had the same objects as the Royal Society, which is frequently referred to as "the parent Society." It carried on its work for many years and I may here refer to one record on the minutes of the Society setting out a resolution passed at a meeting in 1875 condemning vivisection and sanctioning a petition to Parliament "in favour of a Bill to impose certain proper restrictions "on the practice of vivisection." This apparently was a matter that at that time was a matter of public interest since in the next year, 1876, the Cruelty to Animals Act was passed which did impose restrictions on vivisection. No further resolutions seem to have been passed on the subject. In 1891 the name of the Belfast society was changed to "The Ulster Society "for Prevention of Cruelty to Animals" and it continued to bear this name until it ceased to function on the transfer of its property to the petitioning Society. There is no trace during that time of any step by which the Society became dissociated from the Royal Society.

In 1917 there was an appointment of new trustees in which a case for settling the trust deed was submitted to Mr. H. M. Thompson, the present Recorder of Belfast, and I have had the advantage of seeing attached to the executed trust deed of 6th February, 1917, the very valuable and prudent advice which he gave to the Society. The schedule of this deed shows that at that time the Society had accumulated trust funds of a nominal value of £6,250 and the recitals state the objects of the Society under seven headings, viz :—

(1) The circulation of suitable tracts gratuitously or by cheap sale particularly among persons entrusted with cattle, such as drovers, coachmen, carters, etc. (2) The introduction in schools of books calculated to humanise the mind of youth. (3) The offering of prizes to school-children for essay writing. (4) Frequent appeals to the public through the press and by every mode tending to awaken more general attention to this important and interesting subject.

(5) The employment of inspectors in the markets and streets. (6) The occasional delivery of sermons on the subject. (7) The prosecution of persons guilty of flagrant cruelty and giving publicity to the same. These seem to me to be really an expansion of the original objects of the Royal Society. I infer that in regard to the funds mentioned in the trust deed there were no special conditions or trusts attached.

The present incorporated Society was formed in 1925. At that time the invested funds, though largely in different investments, would seem to have been approximately of the same value as those mentioned in the trust deed.

The Attorney General has contended that section 18 of the Companies Act (Northern Ireland) is only applicable in the case of the original formation of a trust. I have not been referred to any case recognising the legality of trustees of an existing charity forming themselves into a corporate body to take advantage of section 20 of the Companies (Consolidation) Act, 1908. The section refers to "an association about to "be formed." Whether such an association can undertake the trusteeship of actually existing trusts is open to argument, and if it were necessary for me to decide this I should be inclined to the view that statutory enactment or some express power given in the original trust would be necessary to establish such a power. I am clearly of opinion, however, that in undertaking such a trusteeship, they have no more power to vary the trusts than previous trustees would have had.

Consequently, so far as these funds are concerned, I am of opinion that they could not properly be disposed of for any other objects than such as were lawful under the constitution of the Society in existence at the time they were subscribed. The trustees held them on certain trusts and to hand the funds over to another set of trustees to hold on different trusts would in my opinion be a breach of trust. I am of opinion that such a transfer cannot properly be made where there is any substantial departure from the original objects of the trust. Some doubt on the subject seems

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

MEGAW, J.

to have affected the mind of the draftsman of clause 3 (3) of the memorandum, as this clause authorises the petitioners to take over by way of gift or otherwise from the then existing Society the whole or such part "as may be legally transferred" of its assets, and at the end of clause 3 (15) there are the words: "In case "the Society shall take or hold any property which may "be subject to any trusts, the Society shall only deal "with the same in such manner as allowed by law, "having regard to such trusts." It would seem to me that the Trustees of the unincorporated Society of 1917 took a considerable risk in transferring the funds in their hands to the incorporated society. It would seem to me that at that time they would have exercised no more than reasonable prudence by seeking the assistance of the Court.

In the present application I am not called upon to pronounce the validity of what took place at this incorporation and I do not propose to do so. There are many points open to criticism, including the restriction to Northern Ireland of a socicty which, previous to incorporation, carried on its activities throughout all the Ulster area. But it is material to consider the then existing trusts in the question of sanctioning the extension of the objects, if such comes within my jurisdiction.

The point put in the forefront of the application is to have the foundation of a general hospital for medical and surgical treatment of animals sanctioned. This sanction is asked long after the new activity has been undertaken. At the formation of the petitioners' Society such a hospital has been taken over and has been worked by them for ten years without interference. If I were called on to make a pronouncement on the subject, I should think that the administration of such a hospital would have come within the trusts of the Royal Society, and of the original Belfast Society, though the particulars given in the 1917 Deed would hardly seem to cover this field of active beneficence. The wording of the existing memorandum construed liberally would, I think, especially taken in conjunction with the very wide original trusts, justify the expenditure on the animal hospital.

The petitioners, however, desire something more. They have aked to have some very stringent restrictions sanctioned. They ask that :—

(i) No vivisector or vivisectionist shall be employed in the management of the hospital, or on its medical, surgical, or administrative staff.

(ii) Vivisection in any form shall not be practised. For the purposes of this sub-clause the term " vivisection " shall include any medical, surgical or scientific experiment or treatment of whatsoever nature (whether with or without anæsthetics) upon a living creature the purpose of which is not to benefit the individual creature upon which it is inflicted.

Now, anti-vivisection societies have been held to be lawful charities, but anti-vivisection has never been held as essential to a prevention of cruelty to animals society—and in my opinion it would be improperly restricting the generality of the existing Society to impose such a condition in its administration. The present Society can, no doubt, in its administration see that persons objectionable to the conceptions of its governing body are not employed in its workings, and can see that no form of vivisection is practised but suppose the Society comes under the control of some who have not the same faith, these latter could come to Court and have the memorandum altered to suit their views—that is, supposing that any such alteration could be entertained. I really do not see any useful practical purpose that can be served by the proposed new clauses, even from the point of view of the petitioners.

I am of opinion that no case has been made out corresponding to that which would be necessary to sustain a *cy-près* application. There is no suggestion here that the original trusts cannot be carried out. If the endowment of a hospital is an alteration of the established trusts, it can only be done through the application of *cy-près* principles. The restrictions in regard to vivisection are apparently something more than was contemplated in the original trusts, they are not merely a modification in the working of the existing

Ch.Div. 1934.

IN THE MATTER OF THE ULSTER SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS (INCORPORATED). AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932.

MEGAW, J.

trusts, they are regarded as of vital importance by the petitioners, and in my opinion a Court could only consider such proposals here if a *cy-près* application of the funds was necessary. It was argued at one stage on behalf of the petitioners that this should be regarded as a business undertaking, not a trust, possibly because the Ministry of Commerce had been invoked, but Mr. Black did not pursue this suggestion further than contending that it was inherent in the nature of a registered company to extend its objects even in cases like the present though such extension might go outside the former powers and create trusts for objects not originally contemplated.

On the whole, therefore, I regard the petition as misconceived, and one which, if granted, would revolutionize the principles applicable to the administration of charities, and accordingly I must refuse the petition.

Solicitors for the petitioners: *McLean & Son.*
Solicitor for the Attorney-General: *Hume Babington.*

J. R.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN (1). (1935. No. 6.)

C.A. 1935.

June 13, 24.

Customs—Summary Jurisdiction—Jurisdiction of Justices—Conviction—"Harbouring"—Whether cattle which had been detained by the police on 28th July and were from that time under their control could be properly found by the justices to be harboured on the following day—Distinction between Detention and Seizure—Insufficiency of evidence—Certiorari—Power of Superior Court to examine evidence.

The prosecutor was charged with having knowingly harboured uncustomed cattle imported from the Irish Free State into Northern Ireland, with intent to defraud the King of his duties contrary to the Customs Consolidation Act, 1876.

Separate informations were laid and summonses brought (*a*) for the recovery of the penalty of £744, and (*b*) for an order for the forfeiture and condemnation of the cattle. The offence was alleged to have been committed on 29th July, 1934. The Justices convicted in both cases.

The prosecutor obtained a conditional order for certiorari to quash both of the convictions. In his affidavit he stated that on 28th July, 1934, the police entered upon his lands and found there the sixteen cattle which were the subject matter of the proceedings. The police remained on duty on the lands until the following day, 29th July, under orders not to allow anyone to remove the cattle. On that day they were removed by the police.

The prosecutor also stated in his affidavit that a police sergeant gave evidence before the magistrates that the cattle had been detained on 28th July. He also stated that the police took control of the cattle at 10 p.m. on 28th July, and remained in charge until the 29th July, that the police had no authority to enter upon his lands, and that no evidence was tendered that he had harboured cattle on 29th July.

At the hearing before the magistrates, an application was made on behalf of the Commissioners of Customs and Excise to amend the summons to include harbouring on 28th July, but the magistrates refused to do so, considering such amendment unnecessary.

A conditional order for a writ of certiorari was granted by the Lord Chief Justice on the grounds that the orders were made without

(1) In the Court of Appeal before Andrews and Best, L.JJ., and Megaw, J.

C.A. 1935.

THE KING (BROOKS) *v.* JUSTICES OF COUNTY DOWN.

and in excess of jurisdiction, that they were bad upon their face, and that the police had no authority to enter the lands or seize the cattle.

Cause having been shown the matter came before the King's Bench Division, consisting of Moore, L.C.J., and Brown, J., who held that as previous to the 29th July, 1934, the cattle had been taken out of the control of the prosecutor, he could not have been harbouring them on that date.

The Lord Chief Justice who delivered the judgment of the Court, also stated that the Court threw no doubt on the *King (Martin) v. Mahony* ([1910] 2 I.R. 695), which in the opinion of the members of the Court did not affect the case

The cause shown was therefore disallowed.

The Commissioners of Customs and Excise appealed to the Court of Appeal.

Held, by the Court of Appeal (Andrews, L.J., Best, L.J., and Megaw, J.), reversing the judgment of the King's Bench Division, that the Justices were justified in holding that the prosecutor harboured the cattle on 29th July, during the greater portion of which day they were merely detained and had not been seized by the police.

Held, also, that even if the Justices were wrong in law in holding as they did, their order could not on that ground be quashed on certiorari.

The King (Martin) v. Mahony ([1910] 2 I.R. 695) considered and followed.

APPEAL from an order of the King's Bench Division, consisting of Moore, L.C.J., and Brown, J., making absolute a conditional order for a writ of certiorari directed to the Justices of the Peace for the County of Down, to remove into the King's Bench for the purpose of being quashed the orders made by the Justices at Newry, County Down, on 30th January, 1935, on the hearing of a complaint designated the King at the prosecution of R. W. Carlile, Surveyor of Customs and Excise, Newry, complainant, Hugh Brooks, defendant.

It was charged against Brooks, the prosecutor in the present proceedings, that at Knockarney, County Down, on 29th July, 1934, he knowingly harboured uncustomed goods, viz., sixteen cattle imported from the Irish Free State into Northern Ireland with intent to defraud the King of his duties thereon contrary to section 186 of the Customs Consolidation Act, 1876, and did not, when required, furnish proof as provided under section 16 of the Finance Act, 1934, to the

satisfaction of the Commissioners of Customs that the cattle had not been imported from the Irish Free State or that customs duties had been paid thereon, whereby he incurred a penalty of £744, being treble the duty paid value of the cattle, for which the Commissioners of Customs had elected to sue.

The justices convicted the prosecutor of the offence and ordered that he should forfeit and pay the sum of £744, and in default of payment should be imprisoned for six months without hard labour unless that sum should be sooner paid.

It was also charged against the prosecutor that sixteen cattle (being goods of a class and description in respect of which customs duties are chargeable on importation from the Irish Free State) were found in his possession at Knockarney, County Down, on 29th July, 1934, and were seized because they were imported from the Irish Free State into Northern Ireland without payment of duty, whereby the cattle had become liable to forfeiture under section 16 of the Finance Act, 1934, and that the prosecutor had claimed these cattle.

The Commissioners of Customs had directed proceedings for the forfeiture and condemnation of the goods in accordance with section 207 of the Custom Consolidation Act, 1876, and the justices made an order that the cattle having been claimed by the prosecutor who was duly summoned to show cause why they should not be condemed as forfeited, and the forfeiture having been duly proved before them, they adjudged the cattle to be forfeited, and condemned them accordingly.

On 15th February, 1935, the prosecutor applied for and obtained a conditional order for certiorari to quash both the convictions.

In his affidavit on which he grounded his application, the prosecutor stated that on the 28th July, 1934, the police entered upon his lands and found there the sixteen cattle, the subject matter of the proceedings. The police remained on duty on the lands until the following day, 29th July, under orders not to allow anyone to remove the cattle. On that date they were removed from the lands by the police.

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

The prosecutor also stated in his affidavit that at the hearing before the magistrates Sergeant McFettridge stated that the cattle had been detained on Saturday, 28th July, 1934, and were removed to Newry on Sunday, 29th July, 1934, and that on the Saturday night Sergeant McFettridge had told Constable Hazlett not to allow anyone to remove the cattle.

The prosecutor also stated that the police took control of the cattle at 10 p.m. on 28th July, and remained in charge of them until the 29th July, that the police had no authority to enter upon his lands, and that no evidence was given that he had harboured cattle on 29th July.

At the hearing before the magistrates, it was submitted on behalf of the prosecutor that the seizure on Sunday, 29th July, was bad by reason of the Sunday Observance (Ireland) Act, 1695. An application was then made on behalf of the Commissioners of Customs and Excise that the summons should be amended to include harbouring on 28th July. The magistrates, however, refused the amendment asked for.

The grounds relied upon in support of the conditional order were (*a*) that the orders were made without and in excess of jurisdiction, (*b*) that the orders were bad upon their face, (*c*) that there was no evidence upon which the justices had jurisdiction to convict the deponent of the offences charged, (*d*) that the police had no authority to enter the lands or seize the cattle, (*e*) that the proceedings before the justices were contrary to natural justice, and (*f*) that the orders were bad for ambiguity and uncertainty.

The Lord Chief Justice who heard the application for a conditional order, granted it solely on the grounds that the orders were made without and in excess of jurisdiction, that the orders were bad upon their face, and that the police had no authority to enter the lands or seize the cattle.

Cause having been shown the matter came before the King's Bench Division, consisting of the Lord Chief Justice and Brown, J., who held that as previous to the 29th July, 1934, the cattle had been taken out of the control of the prosecutor, he could not have been harbouring them on that date.

They disallowed the cause shown and made absolute the conditional order for certiorari.

The Commissioners of Customs and Excise appealed to the Court of Appeal.

The Attorney General (*A. B. Babington, K.C.*), and *J. G. Dougherty* for the Commissioners of Customs and Excise :—

We submit that these cattle were not in the possession of the police on the 28th July, they were in the possession of the ostensible owner. There is a difference between " detention " and " seizure." This is made clear by section 202 of the Customs Consolidation Act, 1876.

Goods do not pass into the possession of the Customs Authorities until there has been an actual seizure. The possession must be in somebody, if it has not passed to the Crown, it must remain with the ostensible owner.

Section 207 of the Customs Consolidation Act, 1876, provides that notice shall be given by the seizing officer to the owner of the goods seized, and that seizures shall be claimed within one month.

A detention order is merely a standstill order. The ostensible owner does not cease to be in possession of the goods, until they are seized. If that is so the present prosecutor was harbouring these cattle until they were seized on Sunday evening, 29th July.

We submit the conviction was good under section 223 of the Customs Consolidation Act, 1876, even if the wrong date appeared in the summons.

We rely on *Onley v. Gee* (1). In that case an information charged the appellants under section 3 of the 16 & 17 Vict., c. 119 (" An Act for the suppression " of Betting Houses ") " with having on the 5th day of " October, in the year aforesaid, and on divers other " days and times between the said 5th day of October, " and the laying of the said information " (16th November) " being then and there the occupier of a " certain house in the said city, knowingly and wilfully

(1) 25 J.P. 342.

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

"opened, kept, and used the same for the purpose of "the said Bartholomew Onley betting with persons re- "sorting thereto." The justices convicted him of the offence committed on the 8th November, and the justices stated in their case that it was not established that he so kept the house on the 5th October or on any other day besides.

It was held that the conviction was good, that the offence was well laid as committed on a day certain and on divers other days and times between such day and the laying of the information, and that even if the day of the committing of the offence had been misstated in the information, it was cured by section 1 of the 11 and 12 Vict., c. 43.

We also rely on *Mayor of Exeter v. Heaman* (1). In that case the justices were of opinion that a sale had taken place on the 5th January, and not on the 12th, and they dismissed the information. It was held that they were wrong, and ought to have convicted, for it was clear that there was a sale either on the 5th or 12th, and they should have amended the date of the sale and the information according as they found the fact.

We cannot see that the essentials of natural justice were disregarded in the present case and such a point was not taken before the Divisional Court.

We submit with confidence that even if the justices were wrong in law in holding as they did, their order cannot on that ground be quashed on certiorari.

We rely strongly on the decision in *The King (Martin) v. Mahony* (2), which we submit should be followed in the present case.

In *The King (Martin) v. Mahony* (2), Lord O'Brien cites with approval a passage from *Paley on Summary Convictions*, page 76 (8th ed.), where it is stated that "A sufficient information by competent persons, "relating to a matter within the magistrate's "cognizance, gives him jurisdiction, irrespective of "the truth of the facts contained in it. His authority "to act does not depend upon the veracity or falsehood "of the statements, or upon the evidence being

(1) 42 J.P. 503. (2) [1910] 2 I.R. 695.

" sufficient or insufficient to establish the *corpus* " *delicti* brought under investigation."

Later on in his judgment, Lord O'Brien stated that " The main principle established by *The Queen v.* " *Bolton* (1), that it is the nature of the charge that " establishes jurisdiction, adopted as that principle " has been in an unbroken line of authority from 1841 " to the present day, a period of nearly seventy years, " in my opinion, concludes the case against the " defendant here."(2).

In his judgment in *The King* (*Martin*) *v. Mahony* (2), Lord O'Brien, L.C.J., also cites with approval a passage from the judgment of Cockburn, C.J., in *Reg. v. Russell* (3). Upon this passage we strongly rely.

Lord O'Brien, L.C.J., also quoted with approval in his judgment in *The King* (*Martin*) *v. Mahony* (2), a passage from the judgment of Sir John Richardson in *Brittain v. Kinnaird* (4), that " where the magistrate " has jurisdiction, his conviction is conclusive evidence " of the facts stated in it."

Lord O'Brien also stated in his judgment in *The King* (*Martin*) *v. Mahony* (2), that in *The King v. Eaton* (5), it was laid down as a general proposition, subject to no limitation as to certiorari being taken away or otherwise, that " where an Act gives a general " form of conviction, the party can have no benefit " from certiorari because the proceedings and examina- " tion need not be returned, but the conviction only, " which being general, cannot exhibit the error on the " proceedings."

Gibson, J., in his judgment in *The King* (*Martin*) *v. Mahony* (2), having referred to all the relevant cases, stated that " The above cases show that an apparently " regular adjudication on the merits by justices in a " case within their jurisdiction is conclusive as to all " matters involved in the adjudication, though the " record conceals an erroneous view of law."

It was held by the whole court of King's Bench in *The King* (*Martin*) *v. Mahony* (2), that the decision of

(1) 1 Q.B. 66.
(2) [1910] 2 I.R. 695, 709, 710, 712, 713, 717, 740.
(3) 10 B. & S. 114.
(4) 1 Brod. & B. 432.
(5) 2 T.R. 285.

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

the justices could not be reviewed unless there was error manifest on the face of the conviction, or unless the essentials of natural justice had been disregarded.

On the point as to the distinction between "detention" and "seizure," we rely on *Jacobsohn v. Blake and Compton* (1). In that case the plaintiff having landed some goods liable to duty at the custom-house, they were taken possession of by the defendants, who were custom-house officers, for the purpose of examination, and detained by them upon a misapprehension that they were prohibited and liable to forfeiture. They were afterwards returned to the plaintiff. It was held that the defendants were not liable in trespass. The words used by Tindal, C.J., in his judgment in *Jacobsohn v. Blake* (1), are very material as showing the distinction between "detention" and "seizure."

E. S. Murphy, K.C., and *W. Johnson* for the prosecutor :—

We submit there is no distinction between "detention" and "seizure."

If a person is harbouring, he must have control. Goods cannot be harboured while they are in the control of the Commissioners of Customs and Excise. From the time that the cattle were detained they could not be said to be harboured. Harbouring is inconsistent with the detention of the cattle.

As to the meaning of "detention," we rely on the words used by Hanna, J., in *Dunne v. Clinton* (2).

The magistrates had no evidence before them, on which they were entitled to convict the prosecutor. The word harbouring implies something of a secret character.

There being no legal evidence, the magistrates had no jurisdiction to convict.

Knowingly harbouring ceases from the moment that the police took control. So far as the harbouring was

(1) 6 Man. & G. 919. (2) [1930] I.R. 366, 372.

concerned, the evidence was with regard to an offence alleged to have been committed on Sunday, the 28th July.

We submit that there was no evidence whatever to support the finding of the magistrates, and that they acted without jurisdiction.

The present case is distinguishable from *The King (Martin) v. Mahony* (1). In that case it was contended that the evidence was insufficient to support the conviction. In the present case there is no evidence whatever to support the conviction.

The King (Martin) v. Mahony (1) is not an authority deciding the point at issue in the present case.

We submit that the decision of the King's Bench Division was right.

The Attorney General (in reply):—

The test is, had the magistrates jurisdiction to enter upon the inquiry ?

In the present case there was evidence before the justices which has been recited in the affidavits.

We submit that the law is correctly stated by Tindal, C.J., in *Cane v. Mountain* (2), where he said: "But if the charge be of an offence over which, if the "offence charged be true in fact, the magistrate has "jurisdiction, the magistrates' jurisdiction cannot be "made to depend upon the truth or falsehood of the "facts, or upon the evidence being sufficient or in-"sufficient to establish the *corpus delicti* brought under "investigation." This passage is quoted by Lord Denman in his judgment in *The Queen v. Bolton* (3).

We submit that if the Court thinks it necessary, it has power to amend the date under the power conferred by section 76 of the County Officers and Courts (Ireland) Act, 1877. It is clear from *Mayor of Exeter v. Heaman* (4) that the Court would, if necessary, amend in such a case as the present.

Cur. adv. vult.

(1) [1910] 2 I.R. 695.
(2) 1 Man. & G. 257, 262.
(3) 1 Q.B. 66, 75.
(4) 42 J.P. 503.

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

ANDREWS, L.J.

June 24.

ANDREWS, L.J., delivered the judgment of the Court, which was as follows :—

In this case Brooks, the prosecutor, was charged with knowingly harbouring uncustomed cattle imported from the Irish Free State into Northern Ireland, with intent to defraud the King of his duties, contrary to the Customs Consolidation Act, 1876. Separate informations were laid and summonses brought (*a*) for the recovery of the penalty of £744, and (*b*) for an order for the forfeiture and condemnation of the cattle. The date upon which the offence is alleged in these documents to have been committed is 29th July, 1934. The Justices on 30th January, 1935, convicted in both cases, and ordered and adjudged accordingly.

On 15th February, 1935, the prosecutor, applied for and obtained a conditional order for certiorari to quash both of the said convictions. His application was grounded upon an affidavit in which the material averments were that on Saturday, 28th July, 1934, the police entered upon his lands and found there the sixteen cattle which were the subject-matter of the proceedings. The police remained on duty on the lands until the following day, 29th July, under orders not to allow anyone to remove the cattle. On this latter date they were removed from the lands by the police. The prosecutor states in his affidavit that Sergeant McFettridge gave evidence before the magistrates that the cattle had been "detained" on 28th July. The prosecutor further averred that the police took control of the cattle at 10 p.m. on 28th July and remained in charge of them until 29th ; that the police had no authority to enter upon his lands ; and that no evidence was tendered that he had harboured cattle on 29th July.

The grounds relied upon in the affidavit in support of the conditional order were :—

(*a*) That the orders were made without and in excess of jurisdiction ;

(*b*) That the orders were bad upon their face ;

(*c*) That there was no evidence upon which the Justices had jurisdiction to convict the deponent of the offences charged ;

(*d*) That the police had no authority to enter the lands or seize the cattle;

(*e*) That the proceedings before the Justices were contrary to natural justice; and

(*f*) That the orders were bad for ambiguity and uncertainty.

The Lord Chief Justice, who heard the application, in the exercise of his discretion granted the conditional order solely on the grounds (*a*), (*b*) and (*d*) above mentioned.

An affidavit was also filed by Mr. Best, the Crown Solicitor of Armagh, showing cause against the conditional order, which made it still further clear that the evidence of Sergeant McFettridge before the magistrates was that the cattle had been only "detained" on 28th July, and that the "seizure" was not made until 29th July.

It appears that at the hearing before the magistrates Mr. Rutherford, who appeared on behalf of Brooks, submitted that the seizure on Sunday, 29th July, was bad by reason of the Sunday Observance (Ireland) Act, 1695. Thereupon Mr. Best applied to the magistrates to amend the summons to include harbouring on 28th July, but the magistrates declined to do so, apparently considering such amendment unnecessary. This point under the Sunday Observance Act is admittedly untenable. The Act has no application to such a seizure.

Passing now to the grounds stated in the conditional order, no argument was or could have been advanced before us to the effect that the orders were bad on their face. Further, whilst Mr. Johnson, for the prosecutor, would not expressly abandon the submission that the police had no authority to enter the prosecutor's lands or to seize the cattle, he declined to argue it. This reluctance is not to be wondered at having regard to the provisions of section 196 of the Customs Consolidation Act, 1876, as modified by The Customs (Land Boundary) Regulations, 1923, Regulation 12 and 2nd Schedule, in relation to entry, and to section 202 of the same Act in relation to seizure.

The only ground mentioned in the conditional order which remains to be considered is that the orders

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

ANDREWS, L.J.

were made without and in excess of jurisdiction. The argument advanced in support of this contention was briefly that, as the cattle had been detained by the police on 28th July and were from that time under their control, there was no evidence before the magistrates upon which they could properly find that the cattle were harboured by the prosecutor on the following day—29th July. It is not unimportant to note that this point was not argued or even referred to before the magistrates.

To this argument there are in our opinion two complete answers, the first upon the merits, and the second—the more technical one—that it is not open to the prosecutor in the present proceedings which are brought by way of certiorari.

On the first of these points we are all of opinion that there is no inconsistency between the " detention " as distinguished from the " seizure " of cattle by the police and the continued harbouring of the cattle by the accused person in whose lands they are not only allowed to remain, but in whose lands it is directed that they shall remain. Detention by the police does not dispossess the ostensible owner of the cattle. A mere detention order would not deprive such an owner of his right to feed, water, milk or otherwise tend the cattle. He can still harbour the cattle if he was in fact doing so before the detention took place. We agree with the Attorney-General who describes detention as a " stand-still " order. It is an order which is given not to alter legal rights or liabilities but merely to maintain them—to preserve the status quo—to keep securely the cattle or other goods pending enquiry. The result of such enquiry may be that the detention order is withdrawn and the cattle or other goods are liberated. On the other hand, the result may be that they are seized. Until such seizure has taken place, harbouring, if it existed before detention, continues to exist. We are quite unable to accept Mr. Johnson's argument that there is no distinction between detention and seizure, except that " detention " is the more appropriate word to use in regard to persons whilst " seizure " applies to things. Section

202 of the Act of 1876 is in itself a sufficient answer to such an argument. *Jacobsohn v. Blake* (1), to which we were referred by Mr. Dougherty, supports our opinion as to the existence of a well-recognized distinction in Customs Law between the two terms. In that case the plaintiff had landed some goods liable to duty at the custom-house. They were taken possession of by the defendants, who were custom-house officers. for the purpose of examination and detained by them for six months under an honest doubt, which proved to be a misapprehension, that they were prohibited and liable to forfeiture. They were afterwards returned to the plaintiff, who sued in trespass, but failed, for, as Tindal, C.J., put it, "in order to entitle the "plaintiff to maintain such an action there must have "been an actual seizure of the plaintiff's goods." Erskine, J., was drawing the same distinction when he said: "There was no seizure whatever by the de- "fendants"; and Cresswell, J., added: "Upon their "examination, all that the defendants did was, to "detain them, till it could be ascertained whether or "not they were liable to forfeiture. This is not an "act of trespass."

For these reasons we are all of opinion that the magistrates were fully justified in holding that the defendant harboured the cattle on 29th July, during the greater portion of which they were merely detained and had not been seized by the police.

We are, however, further of opinion that, even if the magistrates were wrong in law in so holding, their order cannot on that ground be quashed on certiorari. We cannot go behind the record. The "uncontrollable "verity of the record" must be allowed to prevail. In *The King (Martin) v. Mahony* (2), Gibson, J., cites ample authority for the proposition that "An appar- "ently regular adjudication on the merits by justices "in a case within their jurisdiction is conclusive as "to all matters involved in the adjudication, though "the record conceals an erroneous view of law." Mr. Murphy endeavoured to meet this proposition by contending that there was no evidence whatever to

(1) 6 Man. & G. 919. (2) [1910] 2 I.R. 695, 740.

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

ANDREWS, L.J.

support the finding of the magistrates, and that, accordingly, as he submitted they acted without jurisdiction. We cannot accept either limb of Mr. Murphy's argument. We have already indicated how, in our opinion, the magistrates had ample evidence to support their finding; and the argument that jurisdiction depends upon evidence or upon a correct view of evidence is entirely at variance with all the judgments in *Mahony's* case (1). Where, as in the present case, the conviction does not set out or incorporate the evidence, and where it does not, as in *R. (Greenaway) v. Armagh J. J.* (2), relate to a fact collateral or preliminary to the actual matter which the Court has to try, the evidence cannot be examined. Neither insufficiency nor absence of evidence will warrant the quashing of an order by certiorari, for the simple reason that they do not oust or destroy jurisdiction—they only amount to error as distinguished from want of jurisdiction. In the *Colonial Bank of Australasia v. Willan* (3), Sir James Colville said (at page 443): "The authorities, of which *R. v. Bolton* (4), and *R. v.* "*St. Olave* (5) may be taken as examples, establish "that an adjudication by a judge having jurisdiction "over the subject matter is, if no defects appear on "the face of it, to be taken as conclusive of the facts "stated therein; and that the Court of Queen's Bench "will not on certiorari quash such an adjudication "on the ground that any such fact, however essential, "has been erroneously found." Such error, if it exists, may be set right by appeal in cases in which an appeal lies, or by case stated for the High Court. Want of jurisdiction is wholly different from and must not be confounded with error in the exercise of it. Jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature. The untruth of facts proved or the insufficiency of evidence does not take away or constitute a want of jurisdiction.

The charge in the present case was right, the information was laid and the summons issued by

(1) [1910] 2 I.R. 695.
(2) [1924] 2 I.R. 55.
(3) L.R. 5 P.C. 417.
(4) 1 Q.B. 66.
(5) 8 E. & B. 529.

competent persons, and they related to a matter within the cognizance of the magistrates. It is not denied that the magistrates had jurisdiction to acquit. If so, they had in our opinion jurisdiction to convict, for jurisdiction is not what O'Brien, L.C.J., calls in *Mahony's* case (1) (at p. 707), "a one-sided thing, a "sort of lop-sided power." If a Court has jurisdiction to go right, it has also jurisdiction to go wrong. As Gibson, J., said (at p. 728): "It could hardly have been supposed that, "alone among earthly tribunals, Justices were gifted "with infallibility." If error exists it may be capable of being remedied, but not on the ground of want of jurisdiction. Absence of jurisdiction only arises where there is no power to decide the matter at all.

Mr. Murphy sought to distinguish *Mahony's case* (1) from the present by submitting that that was a case of mere insufficiency of evidence, and not of what he contends the present case to be—total absence of evidence to support the conviction. The ratio decidendi of *Mahony's case* (1) warrants no such distinction; and, indeed, it will be found that Gibson, J. (at p. 728) treated *Mahony's case* (1) as one in which there was *no* evidence that the defendant occupied or used the shop as the basis of a betting business carried on by him.

In *Mahony's case* (1), Lord O'Brien, L.C.J., cited with approval a passage from the judgment of Cockburn, C.J., in *Reg. v. Russell* (2), in which he referred to an exception from the Court's rigid exclusion of all consideration as to whether the conclusion of the magistrates was right on the merits, namely, if "in "the course of the inquiry something has taken place "inconsistent with natural justice." The Lord Chief Justice in his judgment in the present case apparently had this exception present to his mind; for, after stating that in the opinion of the Court *Mahony's case* (1) did not affect the present, he immediately added: "We think that in coming to their decision "the justices disregarded the essentials of natural "justice." We have given this expression of opinion

(1) [1910] 2 I.R. 695. (2) 10 B. & S. 117.

C.A. 1935.

THE KING (BROOKS) v. JUSTICES OF COUNTY DOWN.

ANDREWS, L.J.

the most careful consideration both during the course of and since the argument, but we are unable to express our concurrence with it. Counsel did not argue it, and, indeed, we doubt if, strictly speaking, it would have been competent for them to have done so ; for, although, as already pointed out, it was one of the points taken by the defendant in his affidavit in support of the conditional order, it was not included in the grounds upon which that order was granted by the Court. We are all of opinion that it would be more contrary to justice if this purely technical point of the date were to succeed, especially when regard is had to the concluding words of section 223 of the Customs Consolidation Act, 1876. Indeed, having regard to Mr. Best's application to the magistrates, we would have been prepared, had we considered it necessary to do so, to make an amendment of date under the powers conferred upon this Court by section 76 of The County Officers and Courts (Ireland) Act, 1877, so as, in the language of the section, to enable the real question at issue to be raised and the case decided as justice should require. *Onley v. Gee* (1) and *Mayor of Exeter v. Heaman* (2) clearly indicate the duty of a court in such a matter.

For these reasons we set aside the order of the King's Bench Division of 17th April, 1935, we allow the cause shown against the conditional order, and discharge the conditional order accordingly. The Commissioners of Customs and Excise are entitled to their costs both in the King's Bench Division and in this Court.

Solicitors for the prosecutor : *Johnson & Rutherford.*
Solicitor for the Commissioners of Customs and Excise : *Chief Crown Solicitor.*

J. McC.

(1) 25 J.P. 342.
(2) 42 J.P. 503.

THE KING (LYNN) v. GALLAGHER (1).

C.A. 1935.

Dec. 9, 13.

Sale of Milk in Northern Ireland—Milk and Milk Products Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 16) sections 1 (1) (c), 2 (2)—Whether section 2 of the Act, requiring a licence for the sale of milk in Northern Ireland applies to milk coming from outside Northern Ireland, the producer not having obtained a licence to sell milk in Northern Ireland—Meaning of "Person"—Validity of Milk and Milk Products Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 16)—Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67) section 4 (7).

The defendant was convicted at L. Petty Sessions for having sold milk in the city of L. otherwise than in accordance with the Milk and Milk Products Act (Northern Ireland) 1934 (24 & 25 Geo. 5, c. 16) and the licence required under that Act, in contravention of the provisions of sub-section 1 (c) of section 1.

The defendant appealed from that decision to the Recorder of L., who affirmed the decision of the justices on the ground that section 2 of the Milk and Milk Products Act (Northern Ireland), 1934, requiring a licence for the sale of milk in Northern Ireland, applies to milk coming from outside Northern Ireland, even where the producer had not obtained a licence to sell milk in Northern Ireland.

The defendant appealed to the Court of Appeal in Northern Ireland, by virtue of section 50 of the Government of Ireland Act, 1920, and section 1 of the Irish Free State (Consequential Provisions) Act, 1922 (Session 2).

Held, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.), dismissing the appeal (*a*) that the word "person" in section 1 (1) of the Milk and Milk Products Act (Northern Ireland), 1934, applies to all producers irrespective of the place of production, and that the word "milk" in section 1 (1) (*c*) must be interpreted in the same way; (*b*) that the primary object of the Milk and Milk Products Act (Northern Ireland) 1934, was not interference with trade, and that the Act did not therefore come within the limitation imposed by section 4 (7) of the Government of Ireland Act, 1920.

APPEAL from a decision of the Recorder of Londonderry affirming an order made by the justices of the petty sessions district of Londonderry city.

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

C.A. 1935.

THE KING (LYNN) v. GALLAGHER.

The appellant, Samuel Gallagher, was convicted by the justices of the petty sessions district of Londonderry city on the 15th July, 1935, and ordered to pay a penalty of 1*s.* 0*d.* and for costs £1, and in default to be imprisoned without hard labour for fourteen days.

The offence charged against him was that on 10th July, 1935, he had sold milk in the city of Londonderry otherwise than in accordance with the Milk and Milk Products Act (Northern Ireland), 1934, and the licence required under that Act, in contravention of the provisions of section 1 (1) (*c*) of that Act.

The appellant appealed from that decision to the Recorder of Londonderry at the General Court of Quarter Sessions, held at Londonderry for the county of the city of Londonderry.

The Recorder of Londonderry affirmed the decision of the justices, being of opinion that section 2 of the Milk and Milk Products Act (Northern Ireland), 1934, requiring a licence for the sale of milk in Northern Ireland, applies to milk coming from a dairy outside the limits of Northern Ireland, even where the producer had not obtained a licence to sell milk in Northern Ireland.

The appellant Gallagher had his dairy and produced his milk at Bogay, County Donegal, outside the limits of Northern Ireland.

The appeal was brought by virtue of the powers contained in section 50 of the Government of Ireland Act, 1920, as amended by the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), section 1, by virtue of which the Court of Appeal in Northern Ireland, so far as cases from Northern Ireland were concerned, took the place of the High Court of Appeal for Ireland.

Nicholson for the appellant :—

The present form of proceeding is quite different from that in *The King* (*Alexander*) *v. Ministry of Agriculture* (1). That case assumed that the Milk and Milk Products Act (Northern Ireland), 1934, was

(1) Unreported.

valid, and an application was made for a licence under that Act.

[ANDREWS, L.J. : If your argument is correct in the present case, does it not follow that the Court must have been wrong in *The King* (*Alexander*) *v. Ministry of Agriculture* (1).]

The litigant in the present case is a different person.

I submit that the question at issue in the present case has never been decided, it is a question of considerable importance, on which there is no authority.

The present case turns on the fact that the defendant has not got a licence ; there is no suggestion as to the quality of the milk.

In *The King* (*Alexander*) *v. Ministry of Agriculture* (1), the Court held that the word " person " in section 2 (2) of the Milk and Milk Products Act (Northern Ireland), 1934, necessarily meant a person producing milk in Northern Ireland. I submit that the word " person " must necessarily receive the same interpretation in section 1 (1) of the Act. In that case the Act does not apply to milk producers outside Northern Ireland.

If the contention put forward on behalf of the Ministry of Agriculture is correct then only Northern Ireland produced milk can be sold in Northern Ireland.

The legislature cannot say that milk is not to be sold in Northern Ireland unless it is produced in Northern Ireland. If the words of section 1 (1) apply to Free State producers as well as to Northern Ireland producers, the result is that producers in the Free State are prevented from selling milk in Northern Ireland.

If the limited interpretation as argued on behalf of the defendant is put upon these words, then no licence is required, and the conviction is bad.

If the argument on behalf of the Ministry of Agriculture is correct, then the word " person " has two different meanings, in the two sections, and the word " milk " has two different meanings.

I also contend that this Milk Act is not within the limits of the constitutional powers of the Northern Ireland Legislature. That Parliament cannot discriminate by enacting that milk must not be sold

(1) Unreported.

C.A. 1935.

THE KING (LYNN) v. CALLACHER.

unless produced in Northern Ireland. The constitution of Northern Ireland is entirely different from that of any of the Dominions.

Section 4 (1) of the Government of Ireland Act, 1920, places this restriction on the powers of the Parliament of Northern Ireland that it shall not have power to make laws except in respect of matters exclusively relating to Northern Ireland. That Parliament has power to make laws for the peace, order, and good government of Northern Ireland. It is provided that it shall not have power to make laws in respect of fourteen different heads. One of the excepted heads is "trade" with any place outside Northern Ireland.

I submit that the word "trade" must be given a very general construction.

The whole structure of the Act shows that it was intended to keep Northern Ireland and Southern Ireland as near together as possible. So far as the flow of goods was concerned Northern Ireland and Southern Ireland were to constitute one customs area.

Northern Ireland remains and the Government of Ireland Act, 1920, is to be construed without regard to the political changes that have taken place since that Act was passed.

That Act provided that neither part of Ireland was to have power to discriminate against the goods of the other.

In the present circumstances the Free State can discriminate, but Northern Ireland cannot.

In the present case there is a discrimination between milk produced in Northern Ireland and milk produced in the Irish Free State. Northern Ireland produced milk is protected ; it is as if a tariff had been imposed. The provisions of section 4 of the Government of Ireland Act, 1920, point to very limited powers having been given to the Parliament of Northern Ireland to legislate with reference to "trade."

If the sale of all goods produced outside Northern Ireland was prohibited that surely would be a law with respect to trade with outside territory.

It is true that section 4 (7) of the Government of Ireland Act, 1920, allows the Parliament of Northern

Ireland to make regulations for the sole purpose of preventing contagious disease, but it cannot be said that the Milk Act was passed for the sole purpose of preventing contagious disease.

This is not a matter of the quality of the milk, nor a regulation of trade, it is a prohibition of trade.

I rely on the words used by Lord Davey in delivering the judgment of the Privy Council in *Municipal Corporation of the City of Toronto v. Virgo* (1), where he said : " No doubt the regulation and governance of " a trade may involve the imposition of restrictions on " its exercise both as to time and to a certain extent " as to place where such restrictions are in the opinion " of the public necessary to prevent a nuisance or for " the maintenance of order. But their Lordships " think there is a marked distinction to be drawn " between the prohibition or prevention of a trade " and the regulation or governance of it, and indeed " a power to regulate and govern seems to imply the " continued existence of that which is to be regulated " or governed. An examination of other sections of the " Act confirms their Lordships' views, for it shews that " when the Legislature intended to give power to " prevent or prohibit, it did so by express words."

If this Milk Act has the effect of prohibition it contravenes the provisions of section 4 of the Government of Ireland Act, 1920.

The powers given by section 4 to make laws for the peace, order and good government of Northern Ireland must be read in the light of the limitations which follow. I submit that the Milk Act is *ultra vires* and outside the powers of the Parliament of Northern Ireland.

The Northern Ireland (Miscellaneous Provisions) Act, 1928, was passed to make miscellaneous amendments in the law applicable to Northern Ireland. Section 2 explains the restrictions contained in section 4 of the Government of Ireland Act, 1920. It enacted that the restrictions contained in section 4 of the principal Act on the power of the Parliament of Northern Ireland to make laws shall not be construed

(1) [1896] A.C. 88, 93.

C.A. 1935.

THE KING (LYNN) v. GALLAGHER.

as preventing that Parliament making laws for the purpose of ensuring that live stock and agricultural produce shall not be sent to Great Britain, the Isle of Man or the Irish Free State except under such regulations as to standards of quality, inspection or compulsory insurance as may be made by or under the authority of that Parliament.

The fact that this Act of 1928 was necessary shows that the Imperial Legislature was acknowledging that the enacting of any laws with reference to quality of goods was outside the province of the Parliament of Northern Ireland.

Section 2 of the Act of 1928 provides a strong argument in favour of the appellant's contention. I rely on that section as showing that the class of legislation of which the Milk Act is an example is within the exception contained in section 4 (7) of the Government of Ireland Act, 1920.

That section throws light on the proper construction of section 4 (7) of the principal Act. If my argument on this branch of the case is not correct, then the Northern Ireland (Miscellaneous Provisions) Act, 1928, was unnecessary. At any rate my argument goes at least to the extent that the matter was not clear in the minds of the Legislature. The decisions in the Privy Council are not helpful as there are restrictions in the Government of Ireland Act, 1920, that are not to be found in the various Acts dealing with the Dominions.

I submit that the appeal should be allowed.

The Attorney General (*A. B. Babington, K.C.*), *Black, K.C.*, and *MacDermott* for the Ministry of Agriculture :—

Section 4 of the Government of Ireland Act, 1920, which provides that the Parliament of Northern Ireland shall have power to make laws for the peace, order, and good government of Northern Ireland, includes everything that is not specifically excluded.

We rely on the words used by Viscount Sankey, L.C., in delivering the judgment of the Privy Council in *British Coal Corporation v. The King* (1).

(1) [1935] A.C. 500, 517, 518.

The words in section 4 of the Government of Ireland Act, 1920, that the Parliament of Northern Ireland shall have power to make laws for the peace, order, and good government of Northern Ireland are very wide.

Section 51 of the Government of Ireland Act, 1920, makes special provision for the decision of questions affecting the constitution of Northern Ireland, by the Privy Council, and section 53 provides that any decision of the Privy Council as to the validity of any law made by or having the effect of an Act of the Parliament of Northern Ireland shall be final and conclusive and binding on all Courts.

We submit that an ordinary private litigant must resort to the Courts of Northern Ireland.

The only limitation on the power of the Parliament of Northern Ireland to make laws with respect to trade is as regards " trade with any place out of the part of " Ireland within their jurisdiction."

If the statute is dealing with a matter which comes within the ambit of the words " peace, order, and good " government," it cannot be *ultra vires.*

Commodities might come into Northern Ireland interfering with " peace, order, and good government." Surely, it cannot be suggested that the Parliament of Northern Ireland would have no power to deal with such trade.

We rely on the decision in *Henrietta Muir Edwards v. Attorney General for Canada* (1), where it was held by the Privy Council that the provisions of the British North America Act, 1867, enacting a constitution for Canada should not be given a narrow and technical construction, but a large and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

We specially rely on the words used by Lord Sankey, L.C., at pages 136, 137 and 143, in delivering judgment.

(1) [1930] A.C. 124, 136, 137, 143.

C.A. 1935.

THE KING (LYNN) v. GALLAGHER.

The decision of the Privy Council in *James v. Cowan* (1) is, we submit, a judicial interpretation of the highest authority.

We agree that the law is correctly stated by Lord Atkin in delivering judgment in *James v. Cowan* (1), where he said: "If the real object of arming the "Minister with the power of acquisition is to enable "him to place restrictions on inter-state commerce, "as opposed to a real object of taking preventive "measures against famine or disease and the like, the "legislation is as invalid as if the legislature itself had "imposed the commercial restrictions."

We rely specially on the words used by Lord Atkin, when he said: "It may be conceded that, even with "powers granted in this form, if the Minister exercised "them for a primary object which was not directed "to trade or commerce, but to such matters as defence "against the enemy, prevention of famine, disease, "and the like, he would not be open to attack because "incidentally inter-state trade was affected."

The mere fact that there is incidental interference with trade is not sufficient to make the statute *ultra vires*.

We submit the principle as expressed by Lord Atkin in *James v. Cowan* (1) applies to the present case. *James v. Cowan* (1) is an even stronger case.

The Court has to inquire what is the subject matter of the legislation and what is its primary object.

All that this Milk Act says is, milk shall not be brought into, and sold in Northern Ireland, unless it conforms to certain regulations.

We rely on *Pea Nut Board v. Rockhampton Harbour Board* (2), and on *Willard v. Rawson* (3).

This Milk Act is simply a domestic, disciplinary Act, enacted for the purpose of obtaining a pure milk supply for the citizens of Northern Ireland.

In the Australian cases that have been referred to the principle that has been adopted is that regard must be paid to what is the object of the legislation, what is its pith and substance.

(1) [1932] A.C. 542, 558, 559.
(2) 48 Commonwealth Law Reports, 266.
(3) 48 Commonwealth Law Reports, 316.

The Act does not interfere with the importation of milk from the Free State, that is not for human consumption, as milk.

We submit that on the facts and on the authorities, this Milk and Milk Products Act (Northern Ireland), 1934, is within the powers of the Parliament of Northern Ireland.

Nicholson (in reply) :—

The constitution of Northern Ireland is entirely different from the Australian and Canadian Constitutions. There is an explicit limitation in the Northern Ireland Constitution which is not to be found in the Constitutions of Australia or Canada.

Section 4 of the Government of Ireland Act, 1920, provides that the Parliament of Northern Ireland shall have power to make laws for the peace, order, and good government of Northern Ireland, but subject to certain limitations which follow. The effect of these limitations is to take the present case outside the principle applicable to the various British Dominions.

The arguments on behalf of the appellant lose sight of the fact that the Imperial Parliament has legislative powers which can be exercised in Northern Ireland.

The statement in the judgment of Lord Atkin in *James v. Cowan* (1) which has been so strongly relied on on behalf of the respondents was merely *obiter*.

I submit that this Milk Act strikes at trade with a place out of the part of Ireland within the jurisdiction of the Parliament of Northern Ireland. If that Parliament passes an Act outside the various exceptions which are contained in the Government of Ireland Act, 1920, and that Act strikes at trade with a portion of Ireland outside the jurisdiction of that Parliament, such an Act would *ultra vires*.

If the Parliament of Northern Ireland had the powers contended for on behalf of the respondents it would not have been necessary for the Imperial Parliament to pass the Northern Ireland (Miscellaneous Provisions) Act, 1928. The very caption to that Act implies the

(1) [1932] A.C. 542, 558, 559.

C.A. 1935.

THE KING (LYNN) v. GALLAGHER.

existence of considerable limitations on the powers of the Parliament of Northern Ireland.

I rely on the words used by Lord Watson in delivering the judgment of the Privy Council in *Attorney General for Ontario v. Attorney General for the Dominion* (1).

Cur. adv. vult.

SIR WILLIAM MOORE, L.C.J.

Dec. 13.

MOORE, L.C.J., delivered the judgment of the Court as follows :—

The appellant, Samuel Gallagher, was convicted by the justices of the petty sessions district of Londonderry city on the 15th day of July, 1935, and ordered to pay a penalty of 1*s.* 0*d.* and for costs £1, and in default to be imprisoned without hard labour for fourteen days, The offence charged was that on the 10th day of July. 1935, he had sold milk in the city of Londonderry otherwise than in accordance with the Milk and Milk Products Act (Northern Ireland), 1934, and the licence required under the said Act, in contravention of the provisions of sub-section 1 (*c*) of section 1 of the said Act (the said Act is hereinafter referred to as "the "Act."). From this decision, as he was entitled to do, Samuel Gallagher appealed to the Recorder of Londonderry at the General Court of Quarter Sessions, held at Londonderry for the county of the city of Londonderry, and as result of that appeal the Court made an Order that the decision of the justices should be affirmed, the Court being of the opinion that section 2 of the Act, requiring a licence for the sale of milk in Northern Ireland, applies to milk coming from a dairy outside the limits of Northern Ireland, even although the producer shall not obtain a licence to sell milk in Northern Ireland.

The facts were not in dispute, the outstanding one being that the appellant Gallagher had his dairy and produced his milk at Bogay, County Donegal, outside the limits of Northern Ireland.

The present appeal was brought by virtue of the powers contained in section 50 of the Government of Ireland Act, 1920, under which an appeal lay to the High Court of Appeal for Ireland. This was subse-

(1) [1896] A.C. 348, 360, 361.

quently amended by the Consequential Provisions Act of 1922, section 1, by virtue of which the Court of Appeal in Northern Ireland, so far as cases from Northern Ireland were concerned, took the place of the High Court of Appeal for Ireland, and so it is before us now.

Mr. Nicholson for the appellant has argued before us two distinct grounds of appeal, (*a*) one arising under the Act, and the other (*b*) under the Government of Ireland Act, 1920, section 4, (sub-section 7). We propose to deal with these separately. He referred to a decision of this Court (affirming the decision of the King's Bench) in the case of Doctor Alexander. (1) Doctor Alexander, a producer outside Northern Ireland, applied for a mandamus to compel the Ministry of Agriculture in Northern Ireland to grant him a licence under section 2 (sub-section 2) of the 1934 Act which stated that "any person" was on payment of the appropriate fee entitled to receive such a licence upon prescribed conditions. This Court held that owing to the framework and other provisions of the Act the word "person" in that sub-section necessarily meant "a person producing milk in Northern Ireland." Mr. Nicholson's argument under the Act was that "person" so interpreted by this Court in Doctor Alexander's case must necessarily receive the same interpretation in section 1 (sub-section 1) of the Act, and if that were so the Act did not apply to individuals producing milk outside Northern Ireland, and, therefore, that Mr. Gallagher was not bound by any of the conditions or limitations which affected producers in Northern Ireland. We look on section 2 (sub-section 2) as an enabling section under which a person can obtain the necessary licence, and on section 1 (sub-section 1) as a prohibitory section, and therefore it does not necessarily follow that the word "person" must receive the same interpretation in both sections. Indeed, as Lord Justice Andrews pointed out, if Mr. Nicholson's argument were sound, the Free State producer, untrammelled and unfettered by any statutory conditions, would have greater advantages in retailing

(1) Unreported.

C.A. 1935.

THE KING (LYNN) v. GALLAGHER.

SIR WILLIAM MOORE, L.C.J.

milk for human consumption in a North Irish market than the producer in Northern Ireland over which the Parliament of Northern Ireland admittedly has jurisdiction. We therefore consider that this argument fails, and that the word "person" in sub-section 1, section 1, applies to all producers irrespective of the place of production. We arrive at the same decision as to the meaning of the word "milk" in the last-named section. Mr. Nicholson's second argument is based upon the Government of Ireland Act, 1920. By section 4 of that Act the Parliament of Northern Ireland was given power to make laws for the peace, order and good government in respect of matters relating to that part of Ireland within their jurisdiction, other than certain specified matters which are set out under no less than fourteen heads in the section itself. Mr. Nicholson relies on sub-section 7 under which there is excluded as one of the foregoing limitations "trade with any place out of the part of Ireland "within their jurisdiction," to which again there are exceptions not necessary for the purpose of this judgment. Mr. Nicholson's argument is that the Act usurps a right by the Northern Parliament which is expressly denied to them by sub-section 7 and the words I have quoted; that, therefore, the Act is *ultra vires* and invalid.

Mr. Attorney General properly observes that this raises a very important constitutional issue: Is the Act an Act dealing with trade with any place out of Northern Ireland? It will be observed that from start to finish there is no mention of export or import or of any duties in respect thereof, and even the word "trade" itself does not appear in the Act. What then is the primary purpose of such an Act? Is it not ordinary legislation passed by a subordinate Parliament for the purpose of regulating the supply of milk for human consumption within their own area? Anyone who reads the Act will see that this is not only the primary but the sole purpose. It is true that it does affect producers in the position of the appellant in so far as it denies to individual producers in the Free State such as the appellant, an open market in the

Northern Ireland city of Derry, and to such extent such hardship may be admitted, but in our judgment such is not legislation in respect of trade with any place out of Northern Ireland, but is possibly a natural sequence from legislation passed solely for North of Ireland purposes and applicable only to the North Irish jurisdiction. Such a sequence might easily follow the passing of any Act of Parliament, but we have been greatly helped by the authorities to which we have been referred and I would specially refer to the speech of Lord Atkin in the Privy Council in the case *of James v. Cowan* (1).

[His Lordship then read a passage from the speech of Lord Atkin in *James v. Cowan* (1), at pages 558-559.]

Looking at the whole framework of the Act we are satisfied that its primary object was not interference with trade and did not therefore come within the limitation imposed by sub-section 7 (section 4) of the Government of Ireland Act, 1920. The Act is therefore within the competence of the Northern Parliament and its provisions are perfectly valid.

The Appeal fails and will stand dismissed with costs.

Solicitor for the appellant: *Joseph Alexander.*

Solicitor for the Ministry of Agriculture for Northern Ireland: *Chief Crown Solicitor for Northern Ireland.*

J. McC.

(1) [1932] A.C. 542, 558, 559.

K.B.D. 1936.

Feb. 24.

THE KING (at the prosecution of James A King, Customs Officer) v. SAMUEL GASS (1).

Customs—Harbouring Uncustomed Goods—Necessity of proving Mens Rea—Onus of Proof—Customs Consolidation Act, 1876 (39 *&* 40 *Vict., c.* 36) *section* 186—*Finance Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 32) *section* 16 (2).

The defendant in a customs prosecution was charged with having knowingly harboured uncustomed goods, viz., five bullocks and two heifers, imported from the Irish Free State into Northern Ireland, with intent to defraud His Majesty the King of the duties thereon, contrary to section 186 of the Customs Consolidation Act, 1876.

It was also charged against him that he did not, when required, furnish proof as provided under section 16 of the Finance Act, 1934, to the satisfaction of the Commissioners of Customs and Excise, that the cattle had not been imported from the Irish Free State, and that under section 186 of the Customs Consolidation Act, 1876, he had incurred a penalty of £225, being treble the duty paid value of the cattle, for which the Commissioners of Customs had elected to sue.

A statement had been given by the defendant to the police in which he professed to account for the history of the cattle. No evidence was given at the hearing of the complaint at petty sessions contradicting the defendant's statement.

At the conclusion of the complainant's case before the Justices, it was submitted on behalf of the defendant that as no evidence of *mens rea* on the part of the defendant had been given, the defendant was entitled to a direction.

On behalf of the complainant it was submitted that by reason of the provisions of section 16 (2) of the Finance Act, 1934, it was not necessary in proceedings under section 186 of the Customs Consolidation Act, 1876, claiming penalties for harbouring uncustomed goods to establish *mens rea* on the part of the defendant.

The Justices refused the application for a direction made on behalf of the defendant and convicted the defendant of the offence charged but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the Justices were wrong in law in holding that it was not now necessary for the complainant by reason of the provisions of section 16 (2) of the Finance Act, 1934, to establish *mens rea* on the part of the defendant, and that the onus of proving guilty knowledge still lay upon the prosecution.

(1) In the King's Bench Division before Moore. L.C.J., and Brown, J.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the justices sitting at Loughgall Petty Sessions as follows :—

This is a case stated by us the Justices sitting at Loughgall petty sessions pursuant to the Summary Jurisdiction Act, 1857, (20 & 21 Vic., c. 43,) on the application in writing of the said defendant (who is dissatisfied with our determination hereinafter set forth as being erroneous in point of law) for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

(1) At the Loughgall petty sessions held on the third day of May, 1935, the complainant who is one of His Majesty's Officers of Customs and Excise charged the defendant that at Drumgane in the County of Armagh on the eleventh day of February, 1935, he knowingly harboured uncustomed goods to wit five bullocks and two heifers, seized on 12th and 13th February, 1935, imported from the Irish Free State into Northern Ireland (and which goods are ordinary merchandise liable to a duty of customs when imported from the the Irish Free State into Northern Ireland) with intent to defraud His Majesty the King of the duties thereon, contrary to section 186 of the Customs Consolidation Act, 1876, and did not when required furnish proof as provided under section 16 of the Finance Act, 1934, to the satisfaction of the Commissioners of Customs and Excise that the said goods had not been imported from the Irish Free State or that Customs Duty had been paid thereon whereby and by force of said section 186 of the said Act he had for such offence incurred a penalty of £225 being treble the duty paid value of the said cattle for which the Commissioners of Customs had elected to sue.

(2) On the hearing of the said complaint evidence was given on behalf of the complainant :

(*a*) that the police had seized on the defendant's farm the bullocks and heifers referred to in paragraph 1 of this Case.

(*b*) that the defendant's said farm was within 20 miles of the land boundary of Northern Ireland,

K.B.D. 1936.

THE KING. (KING) v. GASS.

being the area in Northern Ireland prescribed under the provisions of s. 16 (2) of the Finance Act, 1934.

(*c*) that the defendant had not when required furnished proof to the satisfaction of the Commissioners of Customs and Excise that the goods had not been imported from the Irish Free State or that customs duty had been paid thereon.

(*d*) that a statement had been given by the defendant to the police as to the history of the cattle in his possession on the 11th February, 1935, and that said statement had been signed by the defendant. We refer to said statement a copy of which is annexed to and forms part of this Case. In that statement defendant said he purchased 2 bullocks from James Cooney, Anncurk, 1 red horney heifer from Francis McParland, 2 roan bullocks from Daniel McParland, 1 red and white polly bullock from Patrick Loughran, 1 white horney heifer from Paddy Finnegan.

(*e*) that Sergeant H. Taylor took statements from Daniel McParland, Kathleen McParland, James Cooney, Paddy Finnegan and Patrick Loughran.

(*f*) that a certificate signed by James Cook, Assistant Secretary for the Customs and Excise, was handed in, dated 21st March, 1935, to the effect that the Commissioners were not satisfied that proof had been furnished to their satisfaction that seven bullocks and two heifers found in the possession or control of defendant at Drumgane had not been imported from the Irish Free State or that customs duty had been paid thereon. A copy of said certificate is attached hereto.

(3) The five bullocks and two heifers referred to in the said complaint and in respect of which the imposition of penalties was claimed were :—

(*a*) the two bullocks mentioned in the said statement of the defendant as having been bought by him from James Cooney in Newtownhamilton fair of January.

(*b*) the red horney heifer mentioned in the said statement as having been bought from Francis McParland in the same Fair.

(*c*) the two roan bullocks mentioned in the said statement as having been bought from Dan McParland.

(*d*) the red and white polly bullock mentioned in the said statement as having been bought from Pat Loughran in Markethill Fair.

(*e*) the white horney heifer mentioned in the said statement as having been bought from Paddy Finnegan in Markethill Fair.

(4) No other evidence was given on behalf of the complainant on the hearing of the complaint except that set forth in paragraph 2 of this Case and in particular no evidence was given in contradiction of any of the statements of fact contained in the defendant's said statement.

(5) At the conclusion of the complainant's case Counsel on behalf of the defendant submitted that inasmuch as no evidence had been given by the complainant to suggest :—

(*a*) any knowledge on the part of the defendant that the cattle were uncustomed ; or

(*b*) any intent on the part of the defendant to defraud His Majesty of any duties thereon,

the defendant was entitled to a direction and was entitled to have said complaint dismissed on the ground that there was no evidence of any *mens rea* on the part of the defendant.

(6) The solicitor for the complainant submitted that by reason of the provisions of s. 16 (2) of the Finance Act, 1934, it was not necessary for the complainant in proceedings under the provisions of s. 186 of the Customs Consolidation Act, 1876, claiming penalties for harbouring uncustomed goods to establish *mens rea* on the part of the defendant, but that by virtue of said s. 16 (2) of the Finance Act, 1934, the defendant was liable to the penalties prescribed by said s. 186 of the Act of 1876 in respect of any goods found in his possession and control within the prescribed area in Northern Ireland unless the defendant estab-

K.B.D. 1936.

THE KING. (KING) v. GASS.

lished affirmatively either that the goods had not been imported from the Irish Free State or that customs duty had been paid thereon.

(7) We considered that the contention of the solicitor for the complainant was correct in law and we accordingly refused to grant the direction applied for on behalf of the defendant.

(8) Counsel on behalf of the defendant (stating that he was doing so without prejudice to his application for a direction and dismissal of the complaint) then called the defendant for the purpose of deposing to the truth of the facts set out in his said statement, and other witnesses for the purpose of endeavouring to establish by affirmative evidence that the said cattle had not been imported from the Irish Free State.

(9) The defendant in his evidence denied that he had any knowledge that any of the cattle were uncustomed or that he had any intent to defraud His Majesty of any duties thereon. He also produced witnesses, but we found as a fact that he had not discharged the onus cast upon him under said s. 16 of the Finance Act of 1934 and did not prove to our satisfaction that five of the above-named seven of said cattle were not imported from the Irish Free State or if so imported that duty had been paid thereon. We had a doubt about the white horney heifer and the red and white polly bullock and we accordingly convicted and reduced the penalty from £225 to the sum of £151 10*s.* 0*d.*

(10) At the conclusion of the defendant's case counsel on behalf of the defendant renewed his application for a dismiss of the complaint upon the grounds aforesaid but we adhered to our view of the law as set out in paragraph 7 of this Case, and, having found the facts as stated in paragraph 9 hereof, we convicted the defendant of the charge hereinbefore set out in respect of four bullocks and one heifer, namely :—

(*a*) the two bullocks stated to have been bought from James Cooney.

(*b*) the two roan bullocks stated to have been bought from Dan McParland.

(*c*) the red horney heifer stated to have been bought from Francis McParland,

and we ordered him to forfeit and pay the sum of £151 10*s.* 0*d.* (being treble the value of the said four bullocks and heifer) and in default of such payment to be imprisoned in Belfast Gaol for the period of six months or until said sum be paid.

(11) The defendant having duly required us to state a Case for the opinion of the King's Bench Division we therefore state this Case accordingly.

(12) The point of law upon which the opinion of the King's Bench Division is sought is as to whether we were correct in law in holding that in proceedings under s. 186 of the Customs Consolidation Act, 1876, for the recovery of penalties for harbouring uncustomed goods found within the possession and control of the defendant within the prescribed area in Northern Ireland it was not now necessary for the complainant, by reason of the provisions of s. 16 (2) of the Finance Act, 1934, to establish *mens rea* on the part of the defendant and that the burden of establishing :—

(*a*) the knowledge of the defendant that the goods were uncustomed, and

(*b*) the intent of the defendant to defraud His Majesty the King of the duties thereon,

did not lie upon the complainant but that the burden of disproving such knowledge and intent lay upon the defendant.

E. S. Murphy, K.C., Black, K.C., and *W. Johnson* for the defendant :—

The question to be decided depends upon (*a*) what was the position before the Finance Act, 1934 ? and (*b*) how has that position been affected by that Act ?

The prosecution is brought under section 186 of the Customs Consolidation Act, 1876, and the words in that section are "shall knowingly harbour."

Before the Finance Act, 1934, the prosecutor had to prove (*a*) the origin of the cattle, (*b*) that they were uncustomed, and (*c*) an intent to defraud on the part of the defendant.

K.B.D. 1936.

THE KING (KING) v. GASS.

In *The King (McBirney and Henry) v. The Justices of County Armagh* (1), the defendants were charged with being knowingly concerned in an attempted evasion of duty by knowingly harbouring cattle imported from the Irish Free State into Northern Ireland. Statements were made by the defendants to the police, which were afterwards admitted to be false. No evidence of importation from the Irish Free State into Northern Ireland was given. The justices convicted the defendants but stated a case for the opinion of the King's Bench Division.

It was held by the King's Bench Division that as there was no evidence that any offence had been committed or that the cattle were dutiable the justices were wrong in convicting.

The law has, since that case was decided, been altered by section 16 (2) of the Finance Act, 1934. Section 16 does away with the necessity for the prosecution to prove the origin of the cattle, but it has done nothing more.

Section 16 only enacted with reference to goods sent by land what had already been done by section 178 of the Customs Consolidation Act, 1876, with reference to goods coming by ship.

The point at issue is very similar to that arising where a person is accused of receiving stolen property and the stolen property is found in his possession.

The law in such a case is, we submit, properly stated in *Halsbury, Laws of England*, volume 9, paragraph 1365, page 682, as follows: "If a person is accused of "receiving stolen property, and the stolen property is "found in his possession under circumstances re- "quiring him to give a reasonable account of how "he became possessed of it, and he gives such a "reasonable account by stating the name of the "person from whom he received it, who is shown to "be a real person, it is incumbent upon the prosecution, "unless there is other substantial evidence against "the prisoner negativing the truth of his account, to "show that that account is false by calling as a witness "the person named by the prisoner."

(1) [1934] N.I. 212.

In the present case, there was nothing in the defendant's statement of the origin of the goods, contradicted or proved to be untrue.

We rely on *Sherras v. De Rutzen* (1), where it was held that section 16, sub-section 2 of the Licensing Act, 1872, which prohibits a licensed victualler from supplying liquor to a police constable while on duty, does not apply where the licensed victualler bona fide believes that the police constable is off duty. In that case, Day, J., in his judgment clearly laid down what is the effect of the word "knowingly."

We also rely on *Frailey v. Charlton* (2), where it was held that to constitute the offence of "knowingly "harbouring prohibited goods" under section 186 of the Customs Consolidation Act, 1876, it is not enough that the party charged had such goods in his possession with intent to convey them out of the United Kingdom, he must have done so, "with intent to evade the "prohibition."

There, the respondent, a ship's steward, had on board his ship while lying in the Thames preparatory to her departure for a foreign port, a quantity of soap, which was intended for the use of the passengers on the voyage. The export of soap was prohibited by Royal Proclamation, but the respondent was not aware of the fact of that prohibition. On an information against him under the section for harbouring the soap, it was held that his ignorance of the prohibition afforded a good defence.

Section 16 of the Finance Act, 1934, only deals with the one point as to whether or not the cattle were smuggled.

The necessity of showing *mens rea* on the part of the defendant still lies on the prosecution in spite of section 16.

The Attorney General (*A. B. Babington, K.C.*), and *J. G. Dougherty*, for the Commissioners of Customs and Excise :—

Once it is found that goods have been smuggled and are in the defendant's possession, the onus of

(1) [1895] 1 Q.B. 918, 921. (2) [1920] 1 K.B. 147.

K.B.D. 1936.

THE KING. (KING) v. GASS.

proving the absence of guilty knowledge is thrown on the defendant.

In *The Attorney General v. Siddon* (1), where the only evidence in support of the proceedings for a penalty for harbouring and concealing uncustomed tobacco was the fact that it was found upon the defendant's premises. Alexander, L.C.B., in delivering judgment said: "It is an occurrence of every day to convict "upon such evidence, and if the rule were otherwise "the laws would be completely inoperative. It is "always competent to the defendant to prove his "innocence if he can, but the finding is *primâ facie* "evidence upon which these convictions proceed. "If he does not prove his innocence, the law presumes "his guilt from the fact of the goods being found "concealed upon his premises."

The law is precisely the same in cases of the receiving of stolen goods.

Similarly under the Explosive Substances Acts, it is sufficient to show that explosive substances have been found on the defendant's premises. The defendant must prove that he came by them lawfully. The onus of doing this is on the defendant.

In every criminal case there is intent to defraud.

In *Frailey v. Charlton* (2), the defendant established that he did not know of the prohibition, and that the soap was not for export but for the use of the passengers.

The onus, heavy though it may be, is on the defendant.

We submit that the law is properly stated in *Highmore's Customs Laws* (Third Edition), page 232, as follows:—"Where uncustomed goods are found "upon premises, and the occupier of the premises is "charged with harbouring and concealing them, it "lies upon the defendant to prove his innocence."

It is for the defendant to show that the onus thrown upon him has been discharged. *Mens rea* is presumed in such a case.

There is a presumption in law that the goods have been smuggled. The word "knowingly" really gives

(1) 1 C. & J. 220. (2) [1920] 1 K.B. 147.

the defendant a means of escape, but he must adopt this means of escape.

We submit that the justices adopted the right principle in holding that the defendant must show that he came by the goods honestly.

The Finance Act, 1934, was aiming at the mischief of smuggling, it was endeavouring to put the onus of proof upon the defendant. The words used in section 16 (2) imply that the onus with regard to *mens rea* is shifted.

We submit that once a person gets uncustomed goods into his possession, and is unable to show that they have not been smuggled, guilty knowledge is present.

We rely strongly on *The Attorney General v. Siddon* (1).

We submit that the justices were right in convicting the defendant.

Black, K.C. (in reply):—

The observation of Alexander, L.C.B., in *The Attorney General v. Siddon* (1), was really *obiter*. There was no discussion in that case relating to the word "knowingly." The word "knowingly" was never mentioned.

In the present case the onus is on the prosecutor.

The present case is quite different from *Reg. v. Woodrow* (2), where as was pointed out by counsel on behalf of the Crown, the enactment under consideration was addressed, not to the public generally, but only to the persons carrying on this excisable trade; it did not contain the word "knowingly" or any other words importing that a *scienter* must be proved.

Section 16 (2) of the Finance Act, 1934, merely enacts that where goods are found in the perscribed area unless proof is furnished that the goods have not been imported from the Irish Free State, they are to be deemed, for the purpose of any proceedings for the forfeiture of them, or for any customs penalty in respect of them, to have been imported without payment of duty.

(1) 1 C. & J. 220. (2) 15 M. & W. 404, 410.

K.B.D. 1936.

THE KING. (KING) v. CASS.

This section does not affect *mens rea.*

The onus of establishing that the cattle were "knowingly" harboured lies on the prosecutor. It would be most extraordinary to convict a defendant in such circumstances as the present.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J.: This case comes before us by way of case stated.

[His Lordship having stated the facts, continued]:

The defendant was charged under section 186 of the Customs Consolidation Act, 1876, of the offence of "knowingly harbouring." This offence depends upon intent to defraud His Majesty.

The Attorney General stated that before the Finance Act, 1934, came into force it was necessary to prove guilty intent, but the law had been altered by that Act.

We held some time ago in *The King (McBirney and Henry) v. The Justices of County Armagh* (1), that until there was evidence that the offence of smuggling had been committed, there could not be a conviction of "harbouring" uncustomed goods.

The offence charged depends upon *mens rea.* Before the Act of 1934 it was *primâ facie* necessary to prove *mens rea.* The question is, is the law in that respect altered by the Act of 1934. Section 16 of the Act of 1934 only shifts the onus of proof as to whether or not the cattle were smuggled. That is the only issue that section deals with.

There is a presumption of law that where goods are found in the prescribed area in Northern Ireland until proof is furnished that the goods have not been imported from the Irish Free State, they shall be deemed to be so imported.

There is nothing in section 16 altering the proof as to *mens rea.*

The onus of proving guilty knowledge still lies upon the prosecution.

BROWN, J.

BROWN, J.: I concur with the judgment of the Lord Chief Justice.

(1) [1934] N.I. 212.

Once the owner of the cattle, being in the prescribed area, had failed to prove that the cattle had not been imported from the Irish Free State, he is guilty of smuggling. That is a different matter entirely from the onus of proving guilty knowledge.

It is admitted that prior to the Finance Act, 1934, the onus was upon the complainant of proving guilty knowledge. To change that would be a tremendous alteration in the law.

What does section 16 really do? It seems to me that it applies what had been enacted by section 178 of the Customs Consolidation Act, 1876, with regard to ships, to land transport.

I am satisfied that the effect of section 16 is merely to alter the status of the cattle and nothing more.

The onus which was previously on the Crown with regard to the importation of the cattle is now on the person in possession of the cattle.

The onus of proving guilty knowledge is still on the Crown.

Solicitors for the defendant: *Fisher & Fisher.*

Solicitor for the Commissioners of Customs and Excise: *Chief Crown Solicitor.*

J. McC.

Ch.D. 1933.

Aug. 10, 17.

IN THE MATTER OF AN INDENTURE OF MORTGAGE, DATED 7TH DAY OF APRIL, 1933, AND MADE BETWEEN COATES' BUILDINGS, LIMITED, AND THE LAW UNION AND ROCK INSURANCE COMPANY LIMITED, AND IN THE MATTER OF THE COMPANIES ACT (NORTHERN IRELAND), 1932, SECTION 83 (1).

Practice—Company—Registration of Charge—Extension of Time—Ex parte application—Companies Act (Northern Ireland), 1932 (22 & 23 *Geo.* 5, *c.* 7) *sections* 77 *and* 83.

An application made under section 83 of the Companies Act (Northern Ireland), 1932, to extend the time for the registration of the charge in the Company's register may not be made *ex parte* but must be made upon notice of motion or summons.

Ex parte application under section 83 of the Companies Act (Northern Ireland), 1932, to extend the time for the registration of a charge in the Company's register.

Topping in support of the application.

Cur. adv. vult.

MEGAW, J.

MEGAW, J. : The application made to extend the time for the registration of the charge in the Company's Register seemed to me to have been made in a manner that suggested that the granting of the application was the merest formality, notwithstanding the fact that the Legislature had prescribed a penalty of £50 a day beyond the twenty-one days given for registration. It was made *ex parte* and some of the arguments adduced did not seem to me to furnish very solid reasons for excusing failure to observe the provisions of the Companies Act. I was not referred to any cases or to any rules governing applications of this nature.

The breach of the statutory requirements did not strike me as a trivial matter, and if I had granted the application last week in the terms in which it was put forward, I should have adopted a practice not only

(1) Before Megaw, J., sitting as vacation judge.

contrary to the authorities, but in violation of the Rules of Court. The English Companies Act of 1924 is practically identical with our own Act of 1932, and the section governing the registration of charges is the same in both enactments. The question of giving relief has been considered by the English Courts and important decisions have established what facts must be brought before the Court in support of such applications. The procedure, and the circumstances and conditions under which relief may be granted, also have come under judicial purview, and are the subject matter of comment in the text books. Moreover, our own recently sanctioned rules under the Companies Act, 1932, have provided for the procedure here, and it is quite clear that the matter cannot be dealt with on an *ex parte* application as I have been asked to do.

Solicitor for the applicant: *M. H. Turnbull & Co.*

J. R.

C.A.
1935.

Nov. 4, 6.
Dec. 20.

McGRATH v. TAYLOR.
COONEY v. TAYLOR (1).

Seizure of cattle on behalf of Commissioners of Customs —Notices by plaintiffs demanding return of the cattle—Proceedings for condemnation of cattle as uncustomed goods—Civil Bills for trespass and for trover and conversion of the cattle—Jurisdiction of County Court Judge and Judge of Assize to hear the civil bills whilst proceedings for condemnation were pending—Statutory remedy—Powers of Appeal Judge.

The plaintiffs' cattle were seized by the defendant on behalf of the Commissioners of Customs and Excise, on the 11th February, 1935.

On the 16th February, 1935, demands in writing were served by the plaintiffs on the defendant, requiring the return of the cattle.

On the 26th February, 1935, civil bills were issued by the plaintiffs for trespass, and for trover and conversion of the cattle, against the defendant.

The Commissioners of Customs and Excise directed proceedings to be taken for condemnation of the cattle under section 207 of the Customs Consolidation Act, 1876.

On 5th March, 1935, the Commissioners of Customs and Excise certified that the plaintiffs did not furnish proof that the cattle had not been imported from the Irish Free State or that customs duty had been paid on them.

On 7th March, 1935, the plaintiffs were notified that the cattle were seized as forfeited and that proceedings would be taken for their forfeiture and condemnation.

On 15th March, 1935, summonses were issued against the plaintiffs in respect of the cattle claiming forfeiture and condemnation.

The summonses were listed for hearing at L. Petty Sessions, on 27th March, 1935, but owing to the number of cases listed for hearing, they were not reached, and they were adjourned to 12th April, 1935. Prior to 12th April, 1935, the civil bills brought by the plaintiffs for trespass, and for trover and conversion of the cattle, were heard by the County Court Judge, when it was objected on the part of the defendant that the County Court Judge had no jurisdiction to hear the Civil Bills.

The County Court Judge, having heard the civil bills, granted decrees in favour of the plaintiffs.

On 12th April, 1935, the justices were informed that appeals were lodged against these decrees, and the Justices adjourned the

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

hearing of the summonses for forfeiture and condemnation of the cattle until after the appeals had been determined, although objection was taken to that course on behalf of the Commissioners of Customs and Excise.

The Judge of Assize heard the appeals from the Civil Bills; he found as a fact that the cattle had not been smuggled, but stated a case for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) (Moore, L.C.J., dissenting), that the County Court Judge, and on appeal the Judge of Assize, had no jurisdiction to hear and determine the civil bills for trespass and for trover and conversion of the cattle, whilst the proceedings for the enforcement of penalties and condemnation of the cattle were actually pending.

Case Stated by Brown, J., for the opinion of His Majesty's Court of Appeal in Northern Ireland, at the County of Armagh Summer Assizes, 1935, on the hearing of two civil bill appeals, decrees having been granted by the County Court Judge of Armagh.

The above-named two cases were heard together by me and for the purpose of this case stated may be treated as one. In each case the claim was for damages for illegal seizure of cattle by the defendant, a sergeant of the Royal Ulster Constabulary, who was at the time of the seizure acting as an official of His Majesty's Commissioners of Customs and Excise and duly authorised on that behalf. The seizure was made on the 11th day of February, 1935. Both civil bills were issued on the 26th February, 1935. The civil bill at the suit of Bernard McGrath was served on the 28th day of February, 1935, and the civil bill at the suit of James Cooney was served on the 28th day of February, 1935, and each civil bill was returnable for hearing on the 1st day of April, 1935.

On the 16th day of February, 1935, a demand in writing signed by Bernard McGrath was served upon Sergeant Taylor demanding the return to said Bernard McGrath of the four cattle. On the 16th day of February, 1935, a demand in writing signed by James Cooney was served upon Sergeant Taylor demanding the return to the said James Cooney of one bullock seized off the lands of Bernard M'Gurk.

These claims having been made, the Commissioners directed proceedings to be taken for condemnation

C.A. 1935.

McGRATH v. TAYLOR.

COONEY v. TAYLOR.

under section 207 of the Customs Consolidation Act, 1876, and caused seizure notices to be served.

On the 5th day of March, 1935, the Commissioners of Customs and Excise certified that the plaintiffs did not furnish proof that the said cattle had not been imported from the Irish Free State or that customs duty had been paid thereon. As I decided that in fact the said cattle had not been unlawfully imported the question of the admissibility of the said certificate is not in issue in this case stated. On the 7th day of March, 1935, the plaintiffs were notified that the cattle were seized as forfeited and that proceedings would be taken for the forfeiture and condemnation thereof.

On the 15th day of March, 1935, summonses were issued against the plaintiffs in respect of the said cattle claiming forfeiture and condemnation thereof. The summonses were listed for hearing at Loughgall Petty Sessions on 27th March, 1935, but owing to the number of cases listed for hearing they were not reached and they were adjourned for hearing to the 12th April, 1935. Prior to the 12th April, 1935, the decrees appealed from were granted although it was objected that the County Court Judge had no jurisdiction to hear the cases. On the 12th April, 1935, the Justices were informed that appeals were lodged against these decrees and the justices adjourned the hearing until after the appeals were determined, Mr. Best, solicitor for the Commissioners, objecting.

Mr. Murphy, K.C., appeared for the plaintiff Bernard McGrath, and Mr. Sheil appeared for the plaintiff James Cooney.

Mr. Maginess appeared for the defendant in each case.

Mr. Maginess objected at the commencement of the appeals (1) that the goods when seized were forfeited and there could not be any illegal seizure for want of title until after the appropriate Court had refused to condemn the cattle as forfeited, and (2) that the County Court Judge had no jurisdiction to hear the cases until it had been decided by the magistrates on the hearing of the above-mentioned summonses whether or not the plaintiffs had discharged the onus of proving

that the cattle were not smuggled or that the duty of customs had been paid thereon and asked for a case stated on this point.

I agreed to hear the case and if I found against the defendant on the merits, to state a case. Having heard the evidence of a number of witnesses, I found as a fact that the cattle were not smuggled.

If it is decided that the County Court Judge and I had no jurisdiction to try these cases then the decision of the County Court Judge should be reversed and dismissed with costs.

If it is decided that the County Court Judge and I had such jurisdiction the decision of the County Court Judge should be affirmed with costs and Two pounds ten shillings witnesses' expenses. In any event the costs of this case stated up to Fifteen pounds fifteen shillings will be paid by the defendant.

The Attorney-General (*A. B. Babington, K.C.*) and *Maginess* for the Commissioners of Customs and Excise :—

If the decree of the County Court Judge is to stand, then the jurisdiction that exists under the Customs Acts is ousted.

The onus with regard to cattle found within twenty miles of border would be got rid of. In the civil bill the onus is put on the prosecution. If the decree of the County Court remains the provisions of the Customs Acts would be set aside.

Where the legislature has laid down a specific remedy for enforcing a right, until that remedy is availed of other Courts have no jurisdiction.

There is no estoppel by merely defending the proceedings before the County Court Judge.

It is impossible for a person whose goods have been seized to get outside the machinery provided in section 207 of the Customs Consolidation Act, 1876.

The Commissioners of Customs and Excise took the appropriate steps in these two cases. They have complied with the provisions of section 207, and the jurisdiction conferred by that section is exclusive.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Section 14 of the Customs and Inland Revenue Act, 1879, deals with the question of forfeiture No other Court has jurisdiction in respect of forfeiture, either directly or indirectly. We submit that it is impossible to have a concurrent jurisdiction in another Court.

The plaintiffs are either within this procedure under the Customs Acts, or they are not, they cannot have it both ways.

We submit that proceedings can only be brought by the plaintiffs when there has been a decision of no condemnation. There is no jurisdiction to entertain these proceedings in the County Court until this question of condemnation has been decided.

We submit that the following principle laid down in *Craies on Statute Law* (third edition) at page 217, applies to the present case : " If a statute creates a new " duty or imposes a new liability, and prescribes a " specific remedy in case of neglect to perform the duty " or discharge the liability, the general rule is that no " remedy can be taken but the particular remedy " prescribed by the statute." " Where an Act creates " an obligation," said the Court in Doe d. *Bishop of Rochester v. Bridges* (1), " and enforces the performance " in a specific manner, we take it to be a general rule " that performance cannot be enforced in any other " manner."

It is the duty of the Court to construe legislation in such a way as will not lead to absurdity.

We also rely on the judgment of Erle, J., in *Stevens v. Jeacocke* (2).

We submit that the principle on which we rely applies to the present case.

The only Courts that have jurisdiction are the Courts set out in section 14 of the Customs and Inland Revenue Act, 1879.

Neither the County Court Judge nor the Judge of Assize have power to deal with this question of condemnation. As neither of these two tribunals had such power they could not decide this question of illegal seizure. This question of illegal seizure depends

(1) 1 B. & Ad. 847, 859. (2) 11 Q.B. 731, 742.

upon the issue of condemnation upon which the County Court Judge and the Judge of Assize had no power to pronounce judgment. This question of condemnation can only be decided under the Customs Acts.

We rely on the words used by Lord Esher, M.R., in *The Queen v. County Court Judge of Essex* (1), where he said in his judgment, " Where the legislature has passed " a new statute giving a new remedy, that remedy is " the only one which can be pursued."

This rule of construction applies to the Customs Acts.

The County Court Judge cannot determine whether or not the cattle should be forfeited. If that were to be so, customs legislation would be useless.

There would be an indecent scramble between the Crown and the subject, each of them attempting to get into one of these two Courts before the other.

We rely on the words used by Best, L.J., in his judgment in *Fermanagh County Council v. Parker* (2), when he said, " The general proposition that where a " statute creates an obligation and provides a remedy " for enforcing it, the only remedy is that pointed out " by the statute, is well settled."

The question at issue in the present proceedings can be decided by the justices alone under the Customs Acts.

We rely on *Scott v. Shearman* (3), where it was held that condemnation of goods in the Exchequer is so conclusive, and so alters their property, that trespass will not lie against the officer who seized them, to try the point of forfeiture again.

Blackstone, J., said in his judgment in that case, " I take this condemnation to be conclusive evidence " to all the world, that the goods were liable to be " seized ; and that therefore this action will not lie."

Until the question of condemnation has been determined, it is impossible for the County Court Judge or the Judge of Assize to say to whom the goods belong.

(1) 18 Q.B.D. 704, 707.
(2) [1932] N.I. 153, 164.
(3) 2 Wm. Bl. 977, 979.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

A judgment of condemnation "cannot be blown "aside by a side wind" by proceedings before the County Court Judge.

The County Court Judge gave his decision on one point only, as to whether or not the cattle were smuggled.

There is nothing to justify this action brought by the plaintiff against the seizor. It was expressly for the purpose of preventing litigation that this section of the Customs Consolidation Act, 1876, was passed.

What happened in the present case before the magistrates was very similar to what happened in *The King* (*Deeney*) *v. Justices of Tyrone* (1). In that case Lord O'Brien, L.C.J., dealing with the case of *Reg. v. Adamson* (2) said, "The principle of the decision "was, that if the magistrates in adjourning were "influenced by extraneous and extra-judicial con- "siderations, they were not warranted in adjourning, "and in doing so acted illegally. Were the magis- "trates influenced by extraneous and extra-judicial "considerations in this case? I think they were. "They adjourned, why? Not for any reason affecting "the case before them, but for considerations affecting "another pending case quite independent in its legal "character. They looked outside the case before "them. They unreasonably—extra-judicially—took a "criminal case out of its procedure and priority, and "subordinated a prosecution, on behalf of the King "for a public wrong, to a civil action instituted by a "private person for redress to him as an individual."

We suggest that that was exactly what happened in the present case, and that the prosecution on behalf of the King should have priority.

The plaintiffs have attempted in a roundabout way to get round the Finance Act, 1934.

We submit that the plaintiff's cause of action can only arise after the proceedings for condemnation have been brought to a conclusion.

The question of whether the cattle were smuggled or not can alone be decided by the Court which has power to condemn the cattle.

(1) [1909] 2 I.R. 400, 405. (2) 1 Q.B.D. 201.

This cause of action which is based on illegality must wait for the determination of the question of illegality. That can only be when the Customs authorities have brought the matter before the High Court or the justices in the manner in which the statute directs.

We submit that the County Court Judge and the Judge of Assize had no jurisdiction.

Murphy, K.C., and *Sheil* for the plaintiffs :—

The Crown must establish that there is something in the statutes on which they rely to deprive the prosecutors of their cause of action. This is not a case which turns on onus of proof.

It was held both by the County Court Judge and Judge of Assize that the cattle were not smuggled.

We contend that the plaintiff has a cause of action and that he cannot be deprived of that cause of action on the ground that it is inconvenient to have different remedies in different courts.

Fermanagh County Council v. Parker (1) is of no assistance.

The County Court Judge has not got to determine whether the cattle should have been condemned. He is not deprived of his jurisdiction.

Scott v. Shearman (2) is merely an authority for the proposition that where there is a judgment of condemnation, that judgment is conclusive.

We submit that a subject cannot be thus deprived of his ordinary common law right entitling him to damages. A wrong has been committed against the plaintiff. There is nothing to postpone the cause of action.

We suggest that when section 272 of the Customs Consolidation Act, 1876, which has been repealed, is examined, the argument for the plaintiff becomes all the more convincing.

The Commissioners of Customs and Excise might have had this matter adjudicated by the justices before it came before the County Court Judge.

The plaintiff was only exercising his ordinary common law rights. No legislation exists depriving

(1) [1932] N.I. 153. (2) 2 Wm. Bl. 977.

C.A. 1935.

McGRATH v. TAYLOR.

COONEY v. TAYLOR.

the plaintiff of his ordinary common law right to sue by civil bill before the County Court Judge.

The Attorney-General (in reply) :—

We submit that the plaintiff cannot get away from the jurisdiction of the justices by suing before the County Court Judge.

We submit that even if the plaintiffs had causes of action, those causes ought not to be allowed to proceed to the exclusion of the jurisdiction of the justices.

There is no distinction between seizure and condemnation. Until the question of condemnation has been decided it is impossible to determine whether or not the cattle have been illegally seized.

We submit that the only way the plaintiffs could prove illegal seizure as a fact was by securing a decision of the justices in their favour.

The appropriate place to decide this matter is set out in the Customs Consolidation Act, 1876.

We submit that the cases referred to on behalf of the Commissioners are important from the point of analogy. That was the only ground on which they were cited. The remedy must be pursued within the Statute. The plaintiffs could come in before the justices and make their claim.

The question at issue in the present case is analogous to the principle on which *Fermanagh County Council v. Parker* (1) was decided. There is no right to go to any other Court than the Court prescribed by the Statute.

This is a question of jurisdiction, it does not depend upon some narrow question as to the amount of activity shown by the Commissioners of Customs and Excise.

We submit that these two forms of action ought not to be allowed to proceed concurrently. According to the argument presented on behalf of the plaintiff, the decree stands, and there are two orders of competent Courts in existence, these orders being directly in conflict with each other.

Where a matter has been committed to a special Court, no other Court has jurisdiction.

(1) [1932] N.I. 153.

We do not admit that in a case such as the present an action for illegal seizure can be brought. No such action can be brought where proceedings have been instituted or are about to be instituted under section 207 of the Customs Consolidation Act, 1876. We rely specially on the concluding words of section 207 which show that the whole matter is to be determined under the Customs Consolidation Act, 1876. "Any claim "that can legally be made in respect thereof" is a claim before the justices under the Customs Consolidation Act, 1876. The question of condemnation and the question of ownership are the same.

It is repugnant to all ideas of justice that both sets of proceedings should go on at the same time.

We submit that the Commissioners of Customs and Excise ought not to be compelled to hurry their proceedings because of the apprehension of the issue of a civil bill. Such compulsion would be contrary to all ideas of law and would be indecent.

Section 207 of the Customs Consolidation Act, 1876, refers to a claim that can legally be made subsequent to the condemnation proceedings. There can be no action in respect of the goods themselves, there might be an action in respect of the deterioration of the goods or in respect of any unlawful act done by the officer of Customs. There cannot be an action against the subordinate officer in respect of the seizure of the goods.

If the decision of the County Court Judge ousts the jurisdiction of the justices then the whole jurisdiction under the Customs Acts is destroyed.

Until the question of condemnation is determined no decision can be arrived at as to whether the goods are the property of the Crown or of the plaintiff.

When the civil bill was brought in the present case it was known that the goods had been seized.

We submit that there is no cause of action in respect of the cattle, and even if there is such a cause of action, it cannot be prosecuted until after condemnation.

Where the legislature has established a forum for determining whether goods are to be condemned or not, no other Court has jurisdiction to ascertain this question and to decide the title to the goods. That is

C.A. 1935.

McGRATH v. TAYLOR.

COONEY v. TAYLOR.

what has been done in the present case. The right of action in respect of the property in the goods depends upon condemnation.

We submit upon the whole case that it has not been established that there was jurisdiction in the County Court Judge and the Judge of Assize to deal with this case.

SIR WILLIAM MOORE, L.C.J.

Dec. 20.

MOORE, L.C.J.: This appeal (for such in fact it was) came before us by way of case stated by Mr. Justice Brown from the Armagh Summer Assizes.

The plaintiffs'—(speaking of them severally)—cattle were seized by Sergeant Taylor acting on behalf of the Commissioners of Customs and Excise on February 11th, 1935, and on the 16th February notices (severally) were served by the plaintiffs on Sergeant Taylor demanding the return of the cattle.

The Commissioners responded by directing proceedings to be taken under section 207 of the Customs Consolidation Act of 1876 for their condemnation as goods in respect of which it had not been proved that duty had been paid. These summonses were listed for hearing at Loughgall Petty Sessions, on 27th March, 1935, but owing to pressure of business they stood over for hearing until April 12th following.

In the meantime separate civil bills on behalf of the plaintiffs were issued against Sergeant Taylor on February 26th and duly served.

These civil bills each allege that the defendant on 11th February wrongfully entered on the plaintiffs' (severally) lands and seized the cattle in question, and carried away and deprived the plaintiff of the use of same, and detained from the plaintiff said cattle, and claims damages for trespass, and for trover and conversion of same and for wrongfully depriving plaintiffs (severally) of the said cattle, and for their return and for damages for detinue and for consequential loss and damage.

These civil bills were ripe for hearing and came before His Honour the County Court Judge of County Armagh at the Newry Sessions on 1st April.

For the defendant it was argued that His Honour had no jurisdiction as proceedings were then pending

by direction of the Commissioners in the Petty Sessions Court at Loughgall, and that section 207 of the Act provided the only remedy for deciding whether or not the cattle should be forfeited. If declared to be forfeited, they had been rightly seized and no action for illegal seizure could be brought, but that the County Court Judge had no jurisdiction to determine whether or not such an action lay as the procedure jurisdiction under section 207 was exclusive.

The County Court Judge declined to yield to this contention, and proceeded to hear the cases on their merits and awarded damages in each case amounting to the value of the cattle seized. Appeals were taken from these decisions to the next going Judge of Assize (Mr. Justice Brown).

The same argument was adduced before him at the Armagh Assizes but he proceeded to hear the cases on the merits and affirmed the decisions of the County Court Judge in each case on the questions of fact and stated a case for the opinion of this Court.

There is to my mind no doubt that the powers of the Appeal Judge, though a Judge of the High Court, on the hearing of a civil bill appeal do not exceed those of the County Court Judge who made the orders appealed from.

I also think *mutatis mutandis* for this purpose the County Court Judge has the same jurisdiction as the High Court except that he can not determine claims beyond the statutory limitations as to amount.

It will be also observed that section 207 itself gives the Commissioners power to file their information for condemnation in the Court of Exchequer, now merged in the High Court, at their election. I therefore think that the rights in this case can be determined on the hypothesis that all the proceedings have taken place in the High Court on each side, for, if the plaintiffs' actions would not lie there, it is, I think, plain that they would not lie anywhere else—certainly not in the County Court.

Mr. Attorney, in course of his argument, several times referred to the hardship of suing a humble official who was acting on behalf of a powerful depart-

C.A. 1935.

McGRATH v. TAYLOR.

COONEY v. TAYLOR.

SIR WILLIAM MOORE, L.C.J.

ment such as the Commissioners of Customs and Excise, but he could not say that such an action would not lie. *Chapman v. Lamb* (1), with which is quoted *Tinkler v. Poole* (2), are both authorities which decide that the subject has his action for illegal seizure, trover, conversion, detinue and the like.

This in the present case is the view taken by the learned County Court Judge and by Mr. Justice Brown.

But there is another proceeding under the Customs Consolidation Act, which is a machinery entirely devised for the Commissioners, who can elect whether to put it in force or not. They can seize the goods, and if their right to do so is contested by the owner within one month, which is his only right, they can proceed in the High Court or before justices by virtue of section 207 of the Statute, on information for the forfeiture or condemnation of the goods so seized. This might be a very serious matter for the owner as such condemnation might as a sequence involve fines, penalties and even imprisonment if such condemnation were upheld.

Scott v. Shearman (3), relied on by the Attorney General, was another case in which an action was brought for trespass against customs officials, and it was held there that after condemnation such an action will be stayed, as the record of condemnation is conclusive and the Court will not go behind it.

But if in that case the plaintiff had recovered in trespass before the condemnation, the reasoning of the Judges would seem to me to prevent the same issue of fact (i.e., the legality of the seizure) to be raised again on the hearing of the information ; the more especially so as nowadays the two judgments would be found on my supposition in the same Court—the Exchequer no longer existing.

I am not, however, bound to decide that point definitely because the County Court Judge awarded his damages in trespass, &c., before any condemnation—in fact none has yet taken place. This important factor makes it unnecessary in the present case to follow Mr.

(1) 2 Strange 943.
(2) 5 Burr. 2657.
(3) 2 Wm. Bl. 977.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Attorney's argument based on the difference between judgments *in personam*, and judgments *in rem*.

I think further it is plain that where the information fails, it is open to the owner to bring an action (see section 267 of the Act) but if the judge finds there was reasonable or probable cause for the seizure, and so certifies, the owner can not recover more than twopence damages, and can recover no costs.

Sir William Moore, L.C.J.

But I can not in the Statute or elsewhere find any provision that this is to be the only possible remedy, or any words which would deprive the owner of his common law right to bring an action in trespass or trover to recover damages for the illegality, nor anywhere any derogation from such a right, which I have shown exists.

I think the passage quoted by Wilson, J., in his judgment in *Fermanagh County Council v. Parker* (1) applies here ; it is a passage from the judgment of Willes, J., in *Wolverhampton New Waterworks v. Hawkesford* (2), " Where there was a liability already " existing at common law, and that liability is affirmed " by a statute which gives a special and peculiar form " of remedy different from the remedy which existed " at common law, there unless the statute contains " words which expressly or by necessary implication " exclude the common law remedy, the party suing " has his election to pursue either that or the statutory " remedy." I think the principle here set out is a guide for us in the present case.

I think the County Court Judge in the first instance was correct in hearing the plaintiffs' actions (apart from the merits) and that he was properly affirmed by Mr. Justice Brown.

My colleagues, however, have arrived at a different conclusion and the question raised by the case stated will be answered accordingly.

Andrews, L.J.

Andrews, L.J. : The question submitted for our determination in this case is one purely of jurisdiction : Had the County Court Judge, and, on appeal, had the Judge of Assize, jurisdiction to hear and determine

(1) [1932] N.I. 153, 168. (2) 6 C.B. (N.S.) 337, 356.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

these civil bills for trespass and for trover and conversion of cattle which were brought against a sergeant of the Royal Ulster Constabulary, who, at the time of the commission of the acts complained of—11th February, 1935—was acting as a duly authorised official of His Majesty's Commissioners of Customs and Excise ?

Andrews, L.J.

There are three possible views of the matter, all of which were in turn contended for before us. Mr. Murphy's submission on behalf of the plaintiff was that the necessary jurisdiction existed under section 35 of the Civil Bill Act, 1851 (14 & 15 Vict., C. 57), and that the plaintiff's right to sue was wholly independent of and unaffected by the procedure for recovery of penalties or condemnation of the cattle provided by the Customs Acts. On the other hand, the Attorney General submitted on behalf of the defendant :— (*a*) That the only proceedings which could be taken in connection with the seizure of cattle or other goods by a customs official were such as were expressly authorised and provided for by the Customs Acts, and that no other court had jurisdiction to hear any claim in the matter ; and, alternatively (*b*) That if any independent right of action existed at the suit of the person whose cattle or other goods had been seized, proceedings to enforce such a claim could only be brought after the Customs Acts proceedings for condemnation and forfeiture had been duly prosecuted, and had terminated in favour of the owner.

That the case is a difficult one is evidenced by the difference of opinion which exists between the members of this Court ; but after much careful consideration I am of opinion, both upon the statutes and the authorities, that the Attorney General's second submission is sound ; and that, accordingly, neither the county court judge nor the judge of assize had jurisdiction to hear these cases. I shall state as clearly as possible the reasons which have influenced me in arriving at this conclusion.

In the first place, the owner of goods which have been unlawfully seized by another has undoubtedly a cause of action at common law for such illegal seizure, or for

what I would prefer to call trover and conversion. *Chapman v. Lamb* (1) and *Tinkler v. Poole* (2) afford illustrations of such claims against customs officers. Now Mr. Murphy is quite right in saying that there is no provision in the Customs Acts which wholly deprives a person whose goods have been unlawfully seized of his right of action. On the contrary, there are certain provisions which appear to me clearly to recognise the continued existence of such right. Thus section 267 of the Act of 1876 refers (amongst other things) to an "action . . . against the seizor"; and sections 268-274 are grouped under the caption: "As to actions against "officers of Customs." These are actions against officers of customs for acts done by them in the execution of or by reason of their office. It is immaterial for my present purpose that sections 268-272 were repealed by the Public Authorities Protection Act, 1893, which enacted other general provisions in their place. The point which I wish to emphasise is that the statute recognises and accordingly confirms the existence of such right of action. It is also clear to my mind from a perusal of section 11 of the Customs Act, 1879, that the Attorney General's contention cannot be sustained that such right must be asserted or claim made under the procedure provided by that section. Its scope is the recovery of duties, penalties, and forfeitures incurred under or imposed by the Customs Acts, and the liability to forfeiture of goods seized under the authority thereof. Such proceedings are from their nature brought in the name of the Attorney General or a customs officer against the person who claims to be the owner of the goods and who is alleged to have committed the particular offence. As such they are obviously wholly different proceedings from an action against the seizor; and they are not proceedings in which a claim by the owner against the customs officer can be determined.

To this extent I, accordingly, hold against the Attorney General that a right of action lies against a customs official who has effected an unlawful seizure, and that such right must be enforced by independent

(1) 2 Strange 943. (2) 5 Burr. 2657.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Andrews, L.J.

proceeding, namely, by common law action, and not under the provisions of the Customs Acts.

The important question, however, remains :—When can such action be brought ? Is it competent for the person whose goods have been seized to bring his claim, as he has done in the present case, whilst the proceedings provided for by the statute for the enforcement of penalties and condemnation of the goods are actually pending ?

There are several reasons in my opinion why this question should be answered in the negative against the present plaintiffs.

Thus, there are in my opinion clear statutory indications pointing to this conclusion. By section 207 of the Act of 1876 when goods have been seized and notice has been given by the seizing officer, all seizures are deemed and taken to be condemned unless within a month a claim is made by the person whose goods have been seized. Accordingly, a person whose goods have been seized, if he is to preserve his title, which is of course necessary for the maintenance of his suit, is placed by the Statute in the position that he must *first* submit to the jurisdiction created by the section to have the question of condemnation determined under the Customs Acts by serving the notice under section 207, for, if he did not do so, condemnation would automatically result and his title would be gone.

A further statutory indication that the condemnation proceedings should be brought first is contained in section 267 of the Act of 1876, which provides that when in an information or suit relating to a seizure a verdict be found for the claimant, and if it appears to the judge or justice that there was reasonable or probable cause of seizure, and if he certifies accordingly, such certificate may be pleaded a bar to any action, indictment, or other proceeding against the seizor. The section, accordingly, provides a most valuable statutory defence which would be wholly lost to the seizor (i.e., the customs official) if the claimant were permitted to bring his action to trial before the condemnation proceedings had been duly determined. So, likewise, the seizor would be deprived of the defence

which would be provided by a judgment of condemnation if such were made by the court ; for this, being a judgment *in rem*, would of course be binding upon all parties.

There is next the argument *ab inconvenienti*, to which it is always permissible to have recourse in case of doubt. It appears to me to have a twofold aspect. If a concurrent jurisdiction were held to exist there would necessarily result what the Attorney General called an indecent scramble between the Crown and the subject as to which could get proceedings instituted and determined first. Such a contingency should, if possible, be avoided. But, regrettable as such a scramble would be, it would be much less serious to my mind than is my second objection—the state of chaos which might result from having the purely personal action determined first. The Commissioners of Customs and Excise, who were in no sense parties to the personal action by the claimant, would not be bound by a judgment in that action which amounted to a finding that the goods had not been smuggled. If, therefore, they subsequently succeeded before either the justices or in the King's Bench Division in obtaining a judgment of condemnation, which, as I have already said, would be a judgment *in rem*, it would follow that the judgment in the personal action should never have been obtained. But how would it be set aside and how could complete relief be given from it if execution had been already levied under it ? Precisely similar difficulties would arise, as the Attorney General pointed out, in the converse case, namely, if a dismiss in the claimant's personal action were followed by a refusal on the part of either the justices or the King's Bench Division to condemn the goods. In such event the injustice suffered by the claimant in his personal action would likewise be incapable of remedy. Such happenings would tend to bring the administration of the law into contempt. They could not occur if a judgment *in rem* binding on all persons be the first judgment which is obtained. In truth it is only when condemnation proceedings have been finally determined that one can say with complete confidence whether or not the goods belong to the Crown or to the subject.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Andrews, L.J.

I may add that the possibility of conflicting decisions if the personal action be permitted to be litigated first has been increased by the passing of section 16 of the Finance Act, 1934. That section, which creates a presumption of importation without payment of duty, and accordingly vitally affects onus of proof, is in terms restricted in its application to proceedings for forfeiture or customs penalty; and, accordingly, it could not properly be considered by a County Court judge or High Court judge who was called upon to try the personal action before forfeiture proceedings had been determined. Perhaps in the passing of this section 16 and in the other matters to which I have just referred may be seen the reason for the adoption of the procedure followed in this case, which is in my opinion as novel as it is objectionable.

Lastly, in support of my conclusions I rely upon certain authorities, two of which, as customs cases, appear to demand special attention. In *Vanderberg v. Blake* (1) an action upon the case was brought by the plaintiffs, who claimed to be the owners of certain linen goods which had been seized by the defendant, a customs officer, and subsequently condemned as forfeited by judgment of the court. In these circumstances, Hale, C.J., in his judgment (at p. 195), said :— "It deserves consideration whether an action lies at "all; as this case is, or not; for here the goods are "condemned as forfeited by judgment of the Court; "and the party might have prevented that by coming "in before judgment upon proclamation and claiming "property; and if such an action should be allowed, "the judgment would be blowed off by a side wind: "and so in other actions; as if a man be convicted "of perjury, an action upon the case lies not, though "the prosecution were malicious. It has been a great "doubt in this Court, whether an action of trover lies "after such a condemnation, and adjudged at last that "it does not."

This case, decided almost 300 years ago, has been frequently cited in subsequent cases and always with respect. One of such cases was *Scott v. Shearman* (2),

(1) Hardr, 194, 195. (2) 2 Wm. Bl. 977.

which was an action of trespass against five Custom-House officers for breaking and entering the plaintiff's house and taking away certain of his goods. It was there held by the full Court, in a judgment delivered by Blackstone, J., that condemnation of goods in the Exchequer is so conclusive, and so alters their property, that trespass will not lie against the officer who seized them, to try the point of forfeiture again. "It would "be nugatory," he said, "to debar him from recovering "directly the identical goods that are condemned if "he is allowed to recover obliquely damages equivalent "to their value." The property in the goods had become changed and irrevocably vested in the Crown by the judgment of condemnation; and so neither trespass nor trover could be maintained, for the condemnation has a retrospect and relation back to the time of the seizure. It would not be reasonable that a judgment should be subverted by a collateral action.

Basébé v. Matthews (1) was a case in which the well established rule was applied that in an action for maliciously and without reasonable or probable cause putting the law in motion to the plaintiff's damage, it is essential to aver that the proceeding alleged to have been instituted maliciously and without reasonable or probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of termination. The judgment of Byles, J., is worth quoting *in extenso*: "I think," he said, "we should be disturbing founda-"tions if we were to admit that there is any doubt "that the criminal proceeding must be determined in "favour of the accused before he can maintain an "action for a malicious prosecution. If this were not "so, almost every case would have to be tried over "again upon its merits. In my judgment it makes no "difference that the party convicted has no power of "appealing. This doctrine is as old as the case of "*Vanderberg v. Blake* (2), where Hale, C.J., said "that 'if such an action should be allowed—that is, "'an action against a custom house officer for seizing "'goods, which were afterwards condemned as for-"'feited by judgment of the proper court—the "'judgment would be blowed off by a side-wind.'"

(1) L.R. 2 C.P. 684. (2) Hardr 194.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Andrews, L.J.

This judgment may not be strictly accurate in its reference to *Vanderberg v. Blake* (1), for in that case as I read it, the condemnation proceedings had preceded, not succeeded, the action against the custom-house officer; yet the whole of the judgment, including its reference to *Vanderberg v. Blake* (1) is cited and adopted by Collins, M.R., in *Bynoe v. Bank of England* (2). The important point to my mind is this that several judges have drawn a close analogy between the procedure which should be followed in these customs cases and in the case of criminal charges. Just as in the case of an action for malicious prosecution the plaintiff must show (*inter alia*) that he was prosecuted by the defendant and that the prosecution was determined in his favour; so in my opinion the owner of goods which have been seized by a customs officer can only succeed when he is able to prove that the competent court under the Customs Acts had refused to condemn the goods.

A further analogy might be established with such cases as *The King* (*Deeney*) *v. Tyrone J. J.* (3), in which it was held that the justices had no power to adjourn the hearing of a summons for assault on the ground that a civil action was pending for an alleged assault arising out of the same transaction; but it is in my opinion unnecessary to pursue the matter further. The Commissioners of Customs in the present case acted with propriety and with all reasonable despatch in taking the first step to enable the relevant issues to be determined in accordance with the provisions of the Customs Acts.

In my opinion it would be both unreasonable and contrary to law that they should be defeated in their lawful intentions by the claimant subsequently launching his proceedings for the enforcement of what has been referred to in many cases as a merely collateral remedy. As Dr. Maginess forcibly expressed it in his argument, a cause of action which is based on illegality must wait for the determination of the question of illegality, and this can only be when the customs

(1) Hardr, 194.
(2) [1902] 1 K.B. 467, 470.
(3) [1909] 2 I.R. 400.

authorities have brought the matter before the High Court or the justices in the manner prescribed by statute.

In my opinion the issue of jurisdiction should be answered in the negative.

Best, L.J.: This case raises in an acute form the question whether proceedings brought regularly and at the instance of His Majesty's Commissioners of Customs and Excise, in pursuance of section 207 of the Customs Consolidation Act, 1876, for the condemnation of goods which have been seized, can be held up and possibly be rendered null and void to all intents and purposes by other proceedings brought by a person who claims the goods and alleges that the seizure was illegal. The section in effect provides that whenever any seizure shall be made of goods that are or may be liable to seizure, notice of such seizure must be given to the owner if not present when the seizure was made, and all seizures made under the Customs Acts, or under any Act by which Customs Officers are empowered to make seizures, shall be deemed and taken to be condemned and may be sold or otherwise disposed of in such manner as the Commissioners of Customs may direct unless the person from whom such seizure shall have been made shall within one calendar month from the day of seizure give notice in writing . . . that he claims the things so seized or intends to claim them, whereupon proceedings shall be taken for the forfeiture and condemnation thereof either by information filed in the High Court of Justice on the Revenue Side or exhibited before any justice of the peace. Thus the goods when seized shall be taken and deemed to be condemned, and condemnation becomes absolute at the expiration of a calendar month from the date of seizure unless the person disputing the seizure gives notice in writing that he claims the things so seized or intends to claim them, whereupon proceedings shall be taken for their condemnation and forfeiture either by an information filed in the King's Bench Division of the High Court or exhibited before any justice of the peace. The section is mandatory and allows no undue

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Best, L.J.

delay on the part of the Commissioners as appears from the words "*whereupon* proceedings *shall* be taken "for the forfeiture and condemnation thereof." This is the method and the only method, in my opinion, by which at this stage what may be called the fate of the goods or, if they have been sold, of their proceeds is to be determined, and not by proceedings at the suit of the claimant for detinue or for damages for their illegal seizure. By no other process of law than by the proceedings commanded to be taken in section 207 can forfeiture and condemnation or the reverse be arrived at. If the proceedings end in forfeiture and condemnation of the goods, no cause of action arises in favour of the claimant. Further, though the proceedings by way of information do not result in favour of the Commissioners, yet if it shall appear to the judge or justice before whom the information was heard that there was reasonable or probable cause of seizure, and such judge or justice shall so certify on the record or information, such certificate may be pleaded a bar to any action, indictment, or other proceeding against the seizor (section 267), and it appears to me to be absurd that a claimant should be allowed by invoking the aid of a court not designated in section 207 to litigate the question of his right to damages for illegal seizure when, if the goods are forfeited and condemned, or if the certificate just mentioned be granted, he cannot have any cause of action whatever. In my opinion the only reasonable inference to be drawn from the provisions of section 207 is that once its machinery is put in motion (*a*) by seizure and, if necessary, by the notification of that seizure to the owner, (*b*) by the giving of notice that the owner claims or intends to claim the goods, and (*c*) by the institution of the proceedings commanded to be taken, no court other than that which has seisin of these proceedings has any right to hear a claim in respect of the goods seized until these proceedings have been concluded. That this is the view which ought to be taken of the section and the proper inference to be drawn from its provisions appears to me to be fully confirmed by its concluding words, "but if any things so seized shall be

"of a perishable nature, or consist of horses or other "animals, the same may by direction of the Com- "missioners be sold and the proceeds thereof retained "to abide the result of any claim that may legally be "made in respect thereof" not that shall have been legally made in respect thereof. How could a legal claim be made in respect of the proceeds until it became known whether or not these proceeds were or were not to be condemned ? All the confusion that has arisen in the present case would have been avoided if the meaning that I am suggesting as the correct one had been put upon the section.

But in reply to this it may be asked what is to become of the claim for damages for illegal seizure ? The answer is, let the determination of that matter be postponed until the proceedings which are by section 207 commanded to be taken have been disposed of. Then and then only will the claimants have a cause of action, if any, and it will be limited and conditioned by the provisions of section 267 of the Act. The notice given in pursuance of section 207 by a person claiming goods prevents their automatic and absolute condemnation at the end of one calendar month from the date of seizure, and to that extent affords most valuable protection to his interests, and I know of no principle, legal or equitable, which requires that he should have that protection and at the same time under cover of it should be at liberty to start and to carry to a conclusion proceedings in a tribunal which is not entrusted with the power of saying whether the goods in question should be condemned or not, with the result that the only court competent to decide that question is at least delayed and embarrassed in the performance of its duty and may be altogether prevented from doing it. By his act in giving notice under the section the claimant has, in effect, demanded that the proceedings which must follow that notice should be taken and, in my opinion, he ought not to be allowed to avail himself of other proceedings until the result of those which he has by his own act invoked, is known.

To decide otherwise and to hold that the civil bill court or the assize court or both have full jurisdiction

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Best, L.J.

to take cognizance of the matter will, or may, lead to the following result. The cases will come before the justices for the adjourned hearing of the informations which have been already laid and exhibited. In my opinion, the justices will be at liberty, notwithstanding the decision of this Court and in spite of the finding of fact by the county court judge and by the judge of assize that the goods have not been smuggled, to find that they were in fact imported from the Irish Free State into Northern Ireland, and that duty has not been paid on such importation.

If they should arrive at this conclusion His Majesty's Commissioners of Customs and Excise will be entitled to be paid by each of the plaintiffs three times the duty paid value of his goods that have been seized, whilst in respect of the very same seizure each plaintiff will be entitled to hold his decree for the value of his goods seized, and will, in addition, have his costs of the county court and assize proceedings.

If the submissions put forward on behalf of the plaintiffs are correct there will be nothing to prevent section 207 from being for all practical purposes made a dead letter. Once a seizure is effected by a Customs officer, or by a member of the Royal Ulster Constabulary authorised to act as such officer, all that needs to be done is to issue a civil bill, or in cases outside the county court jurisdiction a writ, claiming damages for illegal seizure, and proceedings to have this question decided can go on, whilst the customs authorities and the justices are left to ponder whether an opportunity will ever arise, and, if so, when, to obey the clear provisions of section 207, and to have it decided whether or not condemnation of the seized goods is to follow.

It should not be lost sight of that further confusion can and will result as soon as the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, comes into operation.

By section 24, sub-section (1), of the Act it is provided that notwithstanding anything in any previous enactment, an appeal shall lie to a Court of Quarter Sessions against an Order of a Court of Summary

Jurisdiction . . . by any party against whom an Order is made for payment of any penal or other sum so that in these smuggling cases where penalties are ordered to be paid an appeal by the aggrieved party will lie to the Court of Quarter Sessions. What would happen in a case like the present ? The County Court Judge decides the matter on a civil bill process for damages for illegal seizure. Is he to be required to decide it again on appeal from the Summary Jurisdiction Court, or will it not mean that in any case where a claimant brings process for illegal seizure and gets a favourable decision from the county court judge, condemnation proceedings under section 207 become quite illusory because it is open to the justice to decide only in accordance with the decision of the county court judge already given. If the justice decides otherwise he will be reversed on appeal.

It may be said that all this anticipated confusion can easily be avoided by applying for a writ of prohibition directed to the learned county court judge, and if it were refused by carrying the matter for ultimate decision by the House of Lords, but if the consequences flow from section 207 which, I think, ought to flow, there would be no necessity for such an application, and there would be no need for anyone to take part in an unseemly scramble to bring the case before one court rather than before another, it would not be necessary to have recourse to tactics which were not inaptly described by the learned Attorney General as " jockeying for position," and it would not be open to anyone to parry or defeat a possible legitimate claim for condemnation by what Blackstone, J., called a side wind in the case of *Scott v. Shearman* (1).

No injustice whatever is done to a claimant if the directions given in section 207 be carried out for after the proceedings indicated by that section have concluded he can then bring to trial the action, indictment, or other proceeding mentioned in section 267 of the Act, and unless the judge or justice before whom the action, etc., is tried or heard shall certify that there was

(1) 2 Wm. Bl. 977.

C.A. 1935.

McGrath v. Taylor.

Cooney v. Taylor.

Best, L.J.

reasonable or probable cause for seizure, the plaintiff will be entitled to recover damages under his rights at common law. He will, in any event, be entitled to recover the value of the proceeds of the sale of the goods (section 207); he will, in addition, if the trial judge or justice refuse to certify reasonable or probable cause for seizure, be entitled to recover damages for that seizure, and even if the certificate be granted he will be entitled to recover damages for any injuries accompanying the seizure, *Baldwin v. Tankard* (1), or for any deterioration of the goods seized whilst in the officer's possession. *Laugher v. Brefitt* (2).

To say that it is a hardship on the claimant that he should be temporarily deprived of his common law right of action is not, in my opinion, justifiable where the goods, as in this case, were goods of a class or description in respect of which a duty of customs is chargeable on importation from the Irish Free State into Northern Ireland, where they were found, as in this case, in possession or control of the claimants within the prescribed area in Northern Ireland, and where for the purpose of any proceedings for their forfeiture or for any customs penalty in respect of them they are deemed to have been imported, under section 16, sub-section 2, of the Finance Act, 1934, without payment of duty unless the contrary is proved.

Before concluding I wish to say one word about the two cases—*Chapman v. Lamb* (3), and *Tinkler v. Poole and another* (4)—brought to our notice by Mr. Murphy at the close of the Attorney General's reply. These were put forward by Mr. Murphy as negativing the Attorney General's argument that there can be no action for illegal seizure in cases like the present. I think they do not support Mr. Murphy's contention nor do they weaken the Attorney General's argument as they merely decide that trover lies against a Custom House Officer for seizing goods not liable to the payment of duty. But in the circumstances of the present case the goods were deemed to have been imported from the Irish Free State without payment of duty

(1) 1 H. Bl. 28.
(2) 5 B. & Ald. 762.
(3) 2 Strange 943.
(4) 5 Burr. 2657.

unless the contrary is proved and therefore *primâ facie* their seizure merely *qua seizure* was legal.

In my opinion, the question put in the case stated should be answered in the negative.

Solicitor for the Commissioners of Customs and Excise: *Chief Crown Solicitor.*

Solicitors for the respondents: *Fisher & Fisher.*

J. McC.

K.B.D.
1936.

The KING (EMERSON) v. HAUGHEY (1).

May 6.
June 15.

Customs—Summary Jurisdiction—Evasion of duty—Dealing with cattle imported without payment of duty—Conviction—Certificate signed by order of Commissioners of Customs and Excise that the same cattle had been found in possession or control of two other persons—Accused not named in certificate—Whether certificate relates only to the goods and is admissible in evidence against any person dealing with the goods where person not named in certificate—Whether certificate if admissible casts onus of proof on defendant though not named in certificate—Finance Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 32) *section* 16.

The defendant was charged at petty sessions on 26th September, 1934, with being knowingly concerned in an attempted evasion of customs duty by dealing with two cattle imported from the Irish Free State into Northern Ireland with intent to defraud, contrary to section 186 of the Customs Consolidation Act, 1876.

The principal evidence against the defendant was a certificate signed by order of the Commissioners of Customs and Excise to the effect that some of the cattle in respect of which he was charged were found in the possession or control of C. O'D., on 13th July, and that on 15th July, some of the same cattle were found in possession of A. M., and that C. O'D. and A. M. being required to furnish proof that the goods had not been imported from the Irish Free State or that customs duty had been paid on them, did not furnish proof to the satisfaction of the Commissioners of Customs and Excise as provided by section 16 of the Finance Act, 1934.

The justices convicted the defendant of the offence with which he was charged, but stated a case for the opinion of the King's Bench Division as to whether they were right in law in convicting the defendant of the charge, and whether the certificate related only to the goods and was valid and admissible in evidence against any person dealing with the goods, whether such person is or is not named in the certificate, and whether if admissible the certificate casts the onus of proof upon the defendant though not named in the certificate.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.) that the certificate was wrongly admitted in evidence against the defendant and his conviction should not stand;

Held also, that as the defendant was never required to explain his possession of the cattle and was afforded no opportunity of

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

making an explanation, section 16 of the Finance Act, 1934, never applied to his case, and that the onus of proof rested on the prosecution and not on the defendant.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the justices sitting at Loughgall Petty Sessions as follows :—

This is a case stated by us the justices sitting at Loughgall Petty Sessions pursuant to the Summary Jurisdiction Act, 1857, 20 & 21 Vict., cap. 43, on the application in writing of the said Michael Haughey, who is dissatisfied with our determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

By summons, dated the 4th day of September, 1934, the defendant was summoned to appear at Loughgall Petty Sessions on the 26th day of September, 1934, to answer a charge, viz. :—

That you the above-named Michael Haughey, at Keady, in the County of Armagh, on the 13th day of July, 1934, were knowingly concerned in an attempted evasion of a duty of customs by dealing with two cattle imported from the Irish Free State into Northern Ireland (and which goods are ordinary merchandise liable to a duty of customs when imported from the Irish Free State into Northern Ireland) with intent to defraud His Majesty the King of the duties thereon contrary to section 186 of the Customs Consolidation Act, 1876.

Whereby and by force of said section 186 of the said Act you have for such offence incurred a penalty of One hundred pounds for which the Commissioners of Customs have elected to sue and by section 16 of the Finance Act, 1934, the onus of proof is upon you.

The facts as proved or admitted were as follows :— Mr. J. P. Best, solicitor for the complainant, at the opening of the case handed in a direction from the Commissioners to prosecute which was proved by James A. King, surveyor of Customs at Armagh, to have been received by him from the Commissioners of Customs. Mr. J. G. Lennon, solicitor for defendant,

K.B.D. 1936.

THE KING (EMERSON) v. HAUGHEY.

objected to this direction being put in on the grounds :—

(1) That same was not directed to any person ;

(2) That the direction was to prosecute three persons.

We admitted the direction to prosecute and permitted Mr. Best to proceed. The further evidence given for the prosecution was to the effect that on the 13th day of July, 1934, Sergeant Albert Roberts saw one Charles O'Donnell, of Curryhughes, in the County of Armagh, in Keady Fair, with two cows and two bullocks which the Sergeant said were of Free State type. He impounded the cattle and brought O'Donnell to the R.U.C. Barracks in Keady where he questioned him and as a result of O'Donnell's answers to such questions he subsequently released to O'Donnell two of the four cattle, namely, one cow and one bullock. On the 15th day of July, 1934, Sergeant Roberts with Constable Anderson again interviewed O'Donnell who made a statement and subsequently they interviewed defendant who also made a statement. Both officers then took defendant to R.U.C. Barracks in Keady, and later brought O'Donnell to the Barracks to identify defendant who was the only civilian in the Barracks and O'Donnell said in defendant's presence : " This is " the man who gave me the £2 to bring the two cattle " to the Fair." Subsequently one Alexander Menary, of Liberty Hall, Armagh, was brought to the Barracks to identify defendant but he (Menary) denied that defendant was the man who sold him the cattle. Sergeant Roberts, in cross-examination by Mr. Lennon, stated one Daniel McKeown, of Curryhughes, was prosecuted on a similar charge in respect of the same cattle, but the charge was dismissed on the merits.

Charles O'Donnell gave evidence to the effect that he had made a statement to the police. (We considered O'Donnell was an obstructive witness and on application of Mr. Best permitted him to cross-examine —Mr. Lennon objecting), in which he said, " I knew the " cattle were smuggled ones." He saw Haughey in the Fair, and he, Haughey, said, " Come along up and " I will pay you," and that thereafter defendant gave

him Two pounds for bringing the two cattle from McKeown's to the Fair. That on Sunday, 15th July, 1934, he saw the two cattle in respect of which he received the Two pounds on the lands of Alexander Menary at Armagh, and that these were the two cattle which Sergeant Roberts had released to him. That he had heard they were smuggled cattle but did not know whether they were or not. That at the R.U.C. Barracks he was asked by police did he know defendant and replied, "I have seen him before." He denied having said in the Barracks, "That is the man who "gave me the Two pounds to take the two cattle to "the Fair." To the Court O'Donnell stated that he got Two pounds for being engaged in smuggling, some got more.

Constable Anderson, R.U.C., said he was in Keady Fair on 13th July, 1934, and there saw two or three men whom he did not then know driving a red cow and a blue bullock which appeared to be of Free State origin into Dalzell's yard. One of the men he could now identify as defendant. He took a statement from O'Donnell and another from defendant. He later saw the same red cow and blue bullock on the lands of Alexander Menary—(statement of defendant read).

Mr. J. P. Best then handed in the certificate from the Commissioners of Customs that they were not satisfied with the account given of cattle as to their origin or alternatively as to duty having been paid thereon.

Mr. Lennon objected to this certificate being put in evidence against his client because :—

(1) It was not evidence against defendant who was not named therein but mentioned two other persons not parties to the proceedings, viz. :— Charles O'Donnell and Alexander Menary.

(2) It was not evidence against defendant because it referred to statements made by others in the absence of defendant which statements were not admissible against defendant and *à fortiori* the certificate based on these statements could not be put in evidence against defendant.

(3) Defendant was never asked to prove that the cattle were not imported or that duty was paid

K.B.D. 1936.

THE KING (EMERSON) v. HAUGHEY.

thereon and that he must first be so asked by a customs officer before a certificate could be put in evidence against him under section 16 of the Finance Act, 1934, and that before section 16 of said Act became applicable at all defendant must first be so called upon to account and the certificate must state that defendant had failed to satisfy the Commissioners as required by said Act.

Mr. Lennon further argued that the Act of 1934 did not become applicable to this case because of these facts and because it had not been proved directly that the cattle were within the prescribed area, he therefore argued that the onus of proof was not on defendant.

Mr. Best submitted that it was not necessary for the prosecution to prove directly that the cattle were within the prescribed area because the court knew of their own knowledge that all the places in which the cattle were proved to have been were within the prescribed area and asked the court to hold that they had judicial knowledge of the fact.

Mr. Best further submitted that it was not necessary that defendant be called upon to prove that the cattle were not imported or that duty had been paid thereon so long as any person in whose possession the cattle were found had been so required and that thereupon the certificate of the Commissioners was applicable and admissible in any proceedings relating to these particular cattle no matter whether the defendant was the person who had failed to satisfy the Commissioners or not. He further submitted that section 16 of the Finance Act, 1934, must be read to mean that the certificate to be given thereunder referred not to the person who made or failed to make the explanation but to the particular goods.

Mr. Best therefore submitted that section 16 of the Finance Act, 1934, was applicable and therefore the onus of proof was on defendant.

We admitted the certificate in evidence and held that :—

(1) It was not necessary for the prosecution to prove directly that the cattle were within the prescribed areas as we knew that Keady and

Lurgyvallen, Armagh and Curryhughes, all in the County of Armagh, are within the prescribed area.

(2) That section 16 of the Finance Act, 1934, did apply and that therefore the onus of proof was on the defendant in this case and that it was not necessary that defendant be called on to prove that the cattle were not imported from the Irish Free State or that duty had been paid thereon and that it was immaterial who had failed to satisfy the Commissioners so long as some person or persons had, and that the certificate referred not to the person, i.e., the defendant in any particular prosecution, but to the goods.

We therefore intimated to Mr. Lennon that if no further evidence were produced we were about to convict defendant and impose the full penalty of One hundred pounds and thereupon Mr.Lennon stated that in view of such intimation he would, without prejudice to his rights and the objections which he had made, produce evidence.

The evidence produced for the defence was to the effect that : When defendant was called upon to make a statement accounting for his movements in Keady Fair on the 13th day of July, 1934, he had made such statement. The statement was as read by the Constable and evidence in corroboration of defendant's statement was given by witnesses. Defendant was not at any time called upon to furnish proof that the cattle had not been imported from the Irish Free State or that the duties on the cattle had been paid or discharged. Defendant corroborated O'Donnell as to what he, O'Donnell, had stated in the Barracks on seeing him (the defendant). Defendant denied in evidence that he had paid Two pounds or any money to O'Donnell in respect of the cattle or that he had any interview with O'Donnell or that he had dealt in any way with the cattle or that they had ever been in his power, custody or control.

In cross-examination by Mr. Best defendant stated that Keady is five miles from the Irish Free State but

K.B.D. 1936.

THE KING (EMERSON) v. HAUGHEY.

he did not know where the lands of Alexander Menary were.

The Justices who adjudicated were :—J. C. Austin, R.M. (chairman) and J. R. O. Cope.

We held that the Finance Act, 1934, applied to this case and that therefore the onus of proof was on the defendant and that defendant had not discharged that onus.

We thereupon found that the cattle were unlawfully imported from the Irish Free State and that the defendant had dealt with the cattle at Keady and had not discharged the onus cast upon him by the Finance Act, 1934, and we convicted the defendant of the charge and fined him One hundred pounds under the summons. We agreed to state a case for the opinion of this Honourable Court and the opinion is sought as to whether we were right in law in convicting the defendant of the said charge, and whether the certificate relates only to the goods and is valid and admissible in evidence against any person dealing with the goods, whether such person is or is not named in such certificate, and whether if admissible such certificate casts the onus of proof upon such defendant though not named in the certificate.

C. L. Sheil for the defendant :—

There is no finding in the case stated as to the ownership of the cattle.

The defendant could not be bound by the explanations given by the other two men. To secure a conviction the cattle must be found in the defendant's possession or control. There is no evidence that O'Donnell was the servant of the defendant, nor that O'Donnell was in fact acting on behalf of the defendant.

The defendant was prosecuted although he had never been asked to give any explanation as to the cattle.

We submit that the construction sought to be put upon section 16 (2) of the Finance Act, 1934, by the Commissioners of Customs and Excise is absolutely untenable.

The defendant is not affected by section 16 (2) of the Finance Act, 1934, for two reasons, (*a*) he is not in possession or control of the cattle, (*b*) he has not had any opportunity of giving an explanation as to his dealings with the cattle.

There is no evidence that the defendant was ever in possession of the cattle.

There was put in evidence a document which was not admissible against the defendant.

Before section 16 of the Finance Act, 1934, can be brought into operation, it must be shown that the defendant had an opportunity of showing that the cattle were not unlawfully imported.

Section 16 can only affect a person who has been asked for an explanation and has not given it.

The Attorney General (*A. B. Babington, K.C.*) and *J. G. Dougherty* for the Commissioners of Customs and Excise :—

We submit that once it is established that a certain person is in possession of the goods, and this person has not supplied an explanation, then the goods are condemned.

The defendant is prosecuted under section 186 of the Customs Consolidation Act, 1876.

The defendant could not be called on to account if he was not in possession of the cattle. The defendant can be convicted although he was not asked to give an explanation.

Once it has been found that the cattle were smuggled goods and forfeited, that finding applies to all subsequent prosecutions.

We submit that the defendant was properly convicted.

Sheil (in reply) :—

The reasonable construction to be put upon section 16 (2) of the Finance Act, 1934, is that it only affects a person who is in possession of the cattle.

MOORE, L.C.J., delivered the judgment of the Court as follows :—

This is a case stated by the justices at Loughgall petty sessions. Michael Haughey was summoned to

K.B.D. 1936.

THE KING (EMERSON) v. HAUGHEY.

SIR WILLIAM MOORE, L.C.J.

appear at Loughgall petty sessions on the 26th day of September, 1934, to answer a charge :—

That you the above-named Michael Haughey at Keady in the County of Armagh on the 13th day of July 1934 were knowingly concerned in an attempted evasion of a duty of customs by dealing with two cattle imported from the Irish Free State into Northern Ireland (and which goods are ordinary merchandise liable to a duty of customs when imported from the Irish Free State into Northern Ireland) with intent to defraud His Majesty the King of the duties thereon contrary to section 186 of the Customs Consolidation Act 1876.

The principal evidence against him in respect of the cattle named was a certificate signed by order of the Commissioners of Customs and Excise, by which it was certified that some of the cattle in respect of which he was charged were found in the possession or control of Charles O'Donnell on the 13th day of July, and on the 15th of July some of the said cattle were found in possession of Alexander Menary, and that O'Donnell and Menary being required to furnish proof that the goods had not been imported from the Irish Free State or that customs duty had been paid thereon, did not furnish proof to the satisfaction of the Commissioners of Customs and Excise as provided by section 16 of the Finance Act of 1934. We were informed at the hearing that both O'Donnell and Menary had been prosecuted, convicted and fined on similar charges to that in the present proceedings.

The justices convicted Michael Haughey of the offence with which he was charged but agreed to state a case for the opinion of this Court, and the question which we have to determine is set out by them :—

"The opinion is sought as to whether we were "right in law in convicting the defendant of the said "charge, and whether the certificate relates only "to the goods and is valid and admissible in evidence "against any person dealing with the goods, whether "such person is or is not named in such certificate, "and whether if admissible such certificate casts "the onus of proof upon such defendant though not "named in the certificate."

The Crown Solicitor tendered this certificate in evidence against Michael Haughey at the hearing but its admission was strongly objected to by the solicitor for the defence. Notwithstanding, the Court received it in evidence against the traverser.

In the first instance, regarding the first question and assuming that section 16 above-mentioned does apply, we can find nothing in that section to make evidence legal according to the ordinary rules of procedure against a person charged which would otherwise be illegal, and we are further of opinion that, while such certificate and also evidence of convictions thereon proved in the proper way would be evidence against each of the persons so charged and convicted, it would not be evidence against Michael Haughey, who was no party to the several proceedings against O'Donnell and Menary. In other words, these matters are *res inter alios acta*, and the traverser can not on the present charge be affected by them ; the fact that the other two men may have had each a guilty knowledge can not establish this as against Haughey. We further answer the first part of the question submitted for our opinion by saying that the certificate was wrongly admitted as evidence against Michael Haughey and his conviction should not stand.

Secondly, there is a further ground against the said conviction which will be found in our answer to the second question, namely : On whom the onus of proof lies ?

Section 16 of the Finance Act is a statutory invasion of the common law right of every traverser to see that the prosecutor proves the case against him, and while, of course, it is the law of the land, this Court should be careful to see that all the requirements imposed by the Statute before such change comes into force have been complied with. Under section 16 the Commissioners are obliged through their servants to require the person to be charged to account for or explain his possession of the contraband articles, and it is only when such explanation fails that the onus of proof is accordingly shifted. In the present case Michael Haughey was never required to explain his possession

K.B.D. 1936.

THE KING (EMERSON) v. HAUGHEY.

SIR WILLIAM MOORE, L.C.J.

of the cattle in question and was afforded no opportunity of making such an explanation. We think, therefore, that section 16 in the circumstances never applied to the case of Michael Haughey, and we answer the second part of the question from the justices by saying that the onus of proof rested on the prosecution and not on the traverser.

We have assumed for the purpose of this judgment that the certificate may be taken as proving itself on production as though, in conjunction with section 16, it were included under section 262 of the Customs Act, 1876, and as far as the question of the duty of the prosecutor to prove his own case is concerned, it may be profitable to refer to the recent House of Lords decision in the case of *Woolmington v. Director of Public Prosecutions* (1), and the judgment of Lord Sankey, C., which was an appeal from the Court of Criminal Appeal in England to that court.

Having answered each of the questions in favour of the traverser, we give him his costs of the case stated measured at £15 15*s.* and remit the case to the justices to proceed according to law.

Solicitor for the defendant: *James C. Lennon.*

Solicitor for the Commissioners of Customs and Excise: *Chief Crown Solicitor.*

J. McC.

(1) 1935 A.C. 462.

C.A. 1936.

June 15.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF ALICE TRAINOR, A REGISTERED OWNER OF LAND, FOLIO 21605, COUNTY ARMAGH.

Land Registry—Errors in Land Registry Maps—Rectification—Jurisdiction—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict., c.* 66) *section* 34 (2)—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34) *section* 32 (6).

A holding 7 *a.* 1 *r.* 30 *per.* in area consisting of a farm on the West side of the county road and small garden and house on the East side of the county road was vested in the appellants under the Land Purchase Acts and subsequently registered on Folio No. 14152 Co. Armagh. In the Land Registry map, however, the lands comprised in the said folio were shown as including only the lands on the West side of the county road. The house and garden on the East side of the county road were not shown as being included in the said folio. This small house and garden were surrounded by and appeared physically to form part of a farm on the East side of the county road which had been in the occupation of Mary Lambe and subsequently became vested in the Land Purchase Commission subject to the payment of a purchase annuity by Mary Lambe. Before any order was made vesting the said holding in the said Mary Lambe default was made in the payment of the said purchase annuity and the Ministry of Finance caused the said holding to be sold to the respondent, Alice Trainor. The holding was duly vested in the said Alice Trainor and was subsequently registered on Folio No. 21605 Co. Armagh.

The holding comprised 7 *a.* 0 *r.* 25 *per.*, which did not include the area of the small house and garden. The farm was described in the vesting order and in the folio as being 7 *a.* 0 *r.* 25 *per.* in area; but in the Land Registry map the small house and garden were shown as being included in the lands comprised in Folio 21605.

Held, reversing the order of Megaw, J., that the Court has jurisdiction under section 34 (2) of the Local Registration of Title (Ireland) Act, 1891, to make an order amending the said Land Registry map.

APPEAL by Catherine Largey and Michael Largey, the registered owners of the lands on Folio No. 14152 County Armagh, from an order of Megaw, J., dated 5th May, 1936, refusing an application by the said Catherine Largey and Michael Largey that Folio No. 21605 County Armagh and the Land Registry map be amended by omitting from the said folio and from the

(1) In the Court of Appeal before Moore, L.C.J., and Best, L.J.

C.A. 1936.

IN RE ALICE TRAINOR.

lands comprised in the said folio as shown on the Land Registry map a house and small garden lately in the occupation of Anne Murphy that the said premises be included in the applicant's holding Folio No. 14152 Co. Armagh and be shown in the Land Registry map as included in the lands comprised in the said Folio No. 14152.

In the year 1911 one Peter Murphy was tenant from year to year of a holding in Creggan Bane, Co. Armagh. The said holding consisted of a farm on the West side of a county road together with a small dwelling house and garden on the East side of the county road. The total area of the said holding was 7*a.* 1 *r.* 30 *per.*, the area of the small dwelling house and garden being 23 perches. By a conveyance, dated 9th December, 1911, Peter Murphy assigned the holding to one James Largey, subject to the right of Anne Murphy (wife of the said Peter Murphy) to use and occupy the said house and garden during her lifetime free of rent.

The said holding formed part of the estate of Emily Adams which was sold to the tenants under the provisions of the Land Purchase Acts. By a vesting order, dated 31st May, 1919, the said lands (described under the said vesting order as 7 *a.* 1 *r.* 30 *per.* in area) were vested in the applicant Catherine Largey, and said lands were subsequently registered on the said Folio No. 14152 Co. Armagh. In the said folio the lands were described as 7 *a.* 1 *r.* 30 *per* in area. In the Land Registry map, however, the lands comprised in the said folio were shown as including only the lands on the West side of the county road. The house and garden on the East side of the county road were not shown on the Registry map as included in the folio.

The small house and garden were surrounded by and appeared physically to form part of a farm on the East side of the county road held by one May Lambe as tenant of Owen Treanor. This farm being subject to the compulsory purchase provisions of the Northern Ireland Land Act, 1925, became on the appointed day vested in the Land Purchase Commission, Northern Ireland, subject to the repayment by the said Mary Lambe of the standard price of £46 16*s.* 10*d.* by a

standard purchase annuity of £2 4s. 6d. Default was made in the payment of the said purchase annuity and prior to the making of any order vesting the said holding in Mary Lambe the Ministry of Finance in the exercise of its statutory powers caused the said holding to be sold and by indenture, dated 8th August, 1934, the said Ministry assigned the said holding to Alice Trainor. By a vesting order, dated 8th July, 1935, the said holding was duly vested in the said Alice Trainor in fee simple and was subsequently registered on Folio No. 21605 Co. Armagh. The area of this farm was 7 *a.* 0 *r.* 25 *per.*, which area did not include the area of the small house and garden. The farm was described in the said indenture of 8th August, 1934, in the vesting order, and in the folio as being 7 *a.* 0 *r.* 25 *per.* in area ; but in the Land Registry map the small house and garden were shown as included in the lands comprised in this Folio No. 21605.

At the date of the purchase of the said farm by Alice Trainor the said Anne Murphy was in occupation of the small dwelling house and garden but she gave up possession of the same to the Largeys in February, 1935.

Davison, K.C., and *Sheil* for the appellants :—

The case comes within the provisions of section 34 (2) of the Local Registration of Title (Ireland) Act, 1891, for the register can be amended "without injury" to the respondent. No injury can be done by depriving a person of an area of land to which he was never in law entitled. *In re Michael Walsh* (1) is precisely in point. In that case a holding of 3 *r.* 10 *per.* was vested in W. by fiat of the Irish Land Commission and registered in his name. On the holding of W. there was a cottage and yard which had for many years been in the possession of K. as a weekly tenant. It had not been intended to include this plot in W.'s holding but by mistake it was not excluded from the map. It was held that the error was one which could be rectified "without injury" to any person who was not a party to the registered transaction and that the register should be amended accordingly.

(1) [1916] 1 I.R. 40.

C.A. 1936.

IN RE ALICE TRAINOR.

In *In re Wilson's Estate* (1) Walker, L.C., said at page 123, " section 34 (2) seemed to be directed to " cases where a piece of land was conveyed where none " of the parties contemplated selling or buying."

Black, K.C., and *Johnson* for the respondent :—

Under section 34 (1) of the Local Registration of Title (Ireland) Act, 1891, the register is made conclusive evidence of the title of the owner to the land as appearing therein. The register can only be rectified either on the ground of actual fraud or where an error occurs in the registration (whether of mis-statement, misdescription, omission or otherwise, and whether in the register or in any map attached thereto) ; but this is expressly limited to cases in which in the opinion of the Court the error can be corrected without injury to any person. By section 32 (6) of the Northern Ireland Land Act, 1925, " injury " in the said section 34 (2) now reads " loss or damage." Where the register is in a certain condition and a person is *primâ facie* entitled to some right under the registration that person cannot be deprived of such right by amending the register without causing an injury or loss or damage to the person having such right.

In *In re Leonard's Estate* (2) where a purchase agreement, duly fiated and registered, reserved a right of way over the land comprised therein in favour of a purchaser from the Land Commission of an adjacent holding, it was held that there was no jurisdiction to to make an order under section 32 (3) of the Land Law (Ireland) Act, 1896, to amend the agreement and rectify the register by omitting the reservation, inasmuch as the same could not be done without injury to the person in whose favour the right was reserved within the meaning of section 34 (2) of the Local Registration of Title (Ireland) Act, 1891.

[They also referred to *In re Hussey's Estate* (1) and *Dooley v. Hough* (3).]

(1) 42 I.L.T. 122.

(2) [1912] 1 I.R. 212, 473.

(3) [1931] I.R. 179.

Davison, K.C., (in reply) :—

In re Leonard's Estate (1) and *In re Hussey's Estate* (2) are distinguishable from the present case in that in those cases there were *bonâ fide* disputes. There must be a legal foundation for the claim in order that in being deprived of it there is some loss or damage. Here there is no loss or damage to the appellants because they had never any title to the land.

MOORE, L.C.J. delivered the judgment of the Court: This appeal only affects a small area of 23 perches. The applicant had this area declared by fiat to be part of his farm. Later an adjoining tenant, Mrs. Alice Trainor, applied to buy out and ultimately had vested in her a holding of 7 acres which excluded this area. But the map in the Local Registry throws this small area into her holding and thereby excludes it from that of the applicant.

SIR WILLIAM MOORE, L.C.J.

The learned judge below said that on the merits of the case he would be prepared to rectify the map but that he considered he was prevented from so doing by section 34 of the Local Registration of Title Act, 1891, in which it is stated : (1) " The register shall be " conclusive evidence of the title of the owner to the " land as appearing thereon ; and such title shall not, " in the absence of actual fraud be in any way affected " in consequence of such owner having notice of any " deed, document or matter relating to the land ; " but nothing in this Act shall interfere with the juris- " diction of any court of competent jurisdiction based " on the ground of actual fraud or mistake, and any " such court may upon such ground make an order " directing the register to be rectified in such manner " and on such terms as it thinks just.

" (2) Where any error occurs in the registration of " the ownership of land (whether of misstatement, " misdescription, omission or otherwise, and whether " in the register or in any map attached thereto), the " court upon such application and in such manner as " may be prescribed, and after such notice, if any,

(1) [1912] 1 I.R. 212, 473.
(2) 42 I.L.T. 122.

C.A. 1936.

IN RE ALICE TRAINOR.

SIR WILLIAM MOORE, L.C.J.

"as it may direct, may, if in the opinion of the court "such error can be corrected without injury to any "person, order such error to be corrected upon such "terms as to costs or otherwise as it may think "fit; . . ."

By subsequent legislation the words "loss or "damage" have been substituted for the word "injury": Northern Ireland Land Act, 1925, section 32 (6).

The question we have to decide here is would the rectification of the register cause such loss or damage. What is the loss to Mrs. Trainor in being deprived of this area of 22 perches of which she was never in possession and which was never vested in her? Her only possible claim depends upon the map, which is admittedly in error. "Loss" must mean legal loss. We think the mistake in the map amounts to a clerical error. Mrs. Trainor cannot be said to suffer legal loss or damage by having something taken from her to which she was never entitled in law.

We therefore allow the appeal with costs, and our order will direct rectification of the Register.

Solicitors for the appellants: *Corr & O'Connor.*
Solicitors for the respondents: *Fisher & Fisher.*

J. R.

STINSON v. CROZIER (1).

High Court of Justice. 1936.

May 8.

Will—Specific devise—Residue—Whether costs of having lands registered should be charged against residue or against devisee of lands—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict., c.* 66) *sections* 84 (1), 87 (1).

A testator devised his farm of land to one of his daughters for her life, and after her death to her son, all the residue of his property went to another daughter.

His executors took out probate of his will.

The farm was subject to the payment of instalments under the Land Purchase Acts, and in winding up the estate the executors had the land registered, at a charge of £6 13*s.* 6*d.*, which was debited against the residue.

The plaintiff, the residuary devisee, brought a civil bill for £6 13*s.* 6*d.*, being the amount by which her residue under the will was decreased.

The County Court Judge gave a decree for £6 13*s.* 6*d.* in favour of the plaintiff but the defendant appealed to the Judge of Assize.

Held, by Moore, L.C.J., sitting as Judge of Assize, affirming the decree made by the County Court Judge of F., that the costs of registration should be borne by the person in receipt of the specific legacy and not by the residuary estate.

By his will a testator devised and bequeathed his farm of land in the townland of Drumcaghey, County Fermanagh, to his daughter, Mrs. Isabella Weir, for her life and after her death to her son Robert. The residue and remainder of testator's property, real and personal, he devised and bequeathed to his daughter, Mrs. Mary Anne Stinson.

His executors, of whom the defendant Crozier was one, took out probate of his will.

The farm at Drumcaghey was subject to the payment of instalments under the Land Purchase Acts and in winding up the estate the executors had the land registered, incurring a cost of £6 13*s.* 6*d.*

Mrs. Stinson sued the executors by civil bill, claiming £6 13*s.* 6*d.*, the amount by which her residue under the will was decreased.

(1) In the High Court of Justice before Moore, L.C.J.

High Court of Justice. 1936.

STINSON v. CROZIER.

The County Court Judge gave a decree for £6 13*s.* 6*d.* in favour of the plaintiff.

The defendant appealed to the Judge of Assize.

The appeal was heard by Moore, L.C.J., sitting as Judge of Assize, who adjourned it to Belfast where he afterwards gave judgment.

Sheil, for the plaintiff :—

Murphy, K.C., for the defendant :—

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J. : This was a civil bill appeal which came before me at the last Assizes of the County of Fermanagh and as the point raised was stated to be of interest to the solicitors' profession, I adjourned it for further consideration to the High Court in Belfast.

James Virtue devised and bequeathed his farm of land in the townland of Drumcaghey to his daughter, Mrs. Isabella Weir, for her life and after her death to her son Robert ; the residue and remainder of his property real and personal went to his daughter, Mrs. Mary Anne Stinson.

His executors, of whom the defendant Crozier was one, took out probate of his will.

The farm at Drumcaghey was subject to the payment of instalments under the Land Purchase Acts and in winding up the estate the executors proceeded to have the land registered incurring thereby a cost of £6 13*s.* 6*d.* (I take this from the statement of counsel).

Mrs. Stinson, plaintiff in the civil bill, sued the executors for this amount by which her residue under the will was decreased.

The question is whether the executors are entitled to charge this payment against the residue or whether the costs of registration should fall upon Mrs. Weir, the devisee of the farm.

Section 84, sub-section 1, of the Local Registration of Title Act, 1891, provides for the vesting of registered land sold under the Land Purchase Acts in the personal representatives of a deceased owner. Section 87, sub-section 1 of the same Act provides for the registration of such land.

I desired to find out what the practice has been here and have consulted the Chief Registrar who tells me that it is not the practice to allow the executors any costs beyond the costs incurred by their assenting to the legacy. The form of this assent will be found in Browning and Glover's book, page 301. There is no form enabling executors to carry the matter further by registration. I think that once they have assented to the legacy their whole duty to the estate in respect of such legacy is at an end.

I would rather gather that this view is correct since Mr. Murphy handed me a resolution passed by the Committee of the Incorporated Law Society of Northern Ireland suggesting a new regulation that such further costs should be allowed as part of the costs of a personal representative.

Mr. Sheil referred me to the case of *In re Grosvenor, Grosvenor v. Grosvenor* (1), and I have read and considered the judgment of Mr. Justice Astbury. I think the principles there enunciated govern the present case, that the costs of registration should be borne by the person in receipt of the specific legacy and not by the residuary estate, and I think the learned County Court Judge was correct in awarding the amount of £6 13*s.* 6*d.* and I affirm his decision with costs of the Appeal.

Solicitors for the plaintiff : *Shields & Murnaghan.*
Solicitors for the defendant : *Falls & Hanna.*

J. McC.

(1) [1916] 2 Ch. 375.

INDEX.

ACKNOWLEDGMENT—STATUTE OF LIMITATIONS— 16
See UNDUE INFLUENCE.

ALTERATION OF OBJECTS IN MEMORANDUM OF ASSOCIATION—CONSENT OF MINISTRY OF COMMERCE 97
See COMPANY.

AMENDMENT OF ORDER BY JUSTICES SUBSEQUENT TO CONDITIONAL ORDER—CONDITIONAL ORDER NOT SERVED TILL AFTER DATE OF AMENDMENT 69
See CUSTOMS (3).

CASES—*Brady v. McDonald* [1931] N.I. 157 considered .. 78
See PRACTICE—CONSOLIDATION.

——*R.* (*Martin*) *v. Mahony* [1910] 2 I.R. 695, considered and followed 115
See CUSTOMS—SUMMARY JURISDICTION.

CERTIFICATE OF COMMISSIONERS OF CUSTOMS—HOW FAR EVIDENCE—ONUS OF PROOF 186
See CUSTOMS (4).

CERTIORARI—POWER OF SUPERIOR COURT TO EXAMINE EVIDENCE 115
See CUSTOMS (5).

CHARGING ORDER—JUDGMENT FOR COSTS—LIEU 64
See SOLICITOR—LIEN.

CIVIL BILL FOR TRESPASS—JURISDICTION OF COUNTY COURT JUDGE AND JUDGE OF ASSIZE—SUMMONS FOR CONDEMNATION 158
See SEIZURE OF CATTLE.

COMPANY—ASSOCIATION NOT FOR PROFIT—ALTERATION OF OBJECTS IN MEMORANDUM—*Confirmation by Court—Jurisdiction—Consent of Ministry of Commerce—Trust—Cy-Près—Functions of Ministry of Commerce—Companies Act* (*Northern Ireland*), 1932 (22 & 23 *Geo.* 5, *c.* 7) *sections* 5, 18 (1) *and* 112—*The Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *section* 20. A company registered under section 18 (1) of the Companies Act (Northern Ireland), 1932, by licence of the Ministry of Commerce, as a company for promoting a charitable object with limited liability but without the addition to its name of the word "limited" cannot extend the objects in its memorandum under section 5 of the said Act where the change in the objects is of a substantial character unless circumstances appear in which the doctrine of *cy-près* would be applicable and the principles of *cy-près* should be followed in the consideration of any such application. *In the Matter of the Ulster Society for Prevention of Cruelty to Animals* (*Incorporated*). *And in the Matter of the Companies Act* (*Northern Ireland*), 1932 (1) .. .. C.D. 97

COMPANY—REGISTRATION OF CHARGE—EXTENSION OF TIME 156
See PRACTICE—COMPANY.

CONDITIONAL ORDER—SERVICE—AMENDMENT BY JUSTICES BEFORE SERVICE 69
See CUSTOMS (3)

CONSANGUINITY—INTESTACY OF HUSBAND—INTESTACY OF WIDOW—Estate under £500—Whether Heir-at-law of Husband or of Widow entitled 74
See DESCENT—CONSANGUINITY.

CONSIDERATION—PAYMENT BY PRAYERS 16
See UNDUE INFLUENCE.

CONSOLIDATION OF ACTIONS—SEPARATE ACTIONS BY HUSBAND AND WIFE—Defence of Contributory Negligence to Husband's Claim .. 78
See PRACTICE—CONSOLIDATION.

CONTRIBUTORY NEGLIGENCE—
SEPARATE DEFENCES—CONSOLIDATION OF ACTIONS .. 78
See PRACTICE—
CONSOLIDATION.

COSTS—JUDGMENT FOR—LIEN 64
See SOLICITOR—LIEN.

COSTS OF REGISTRATION—
WHETHER BORNE BY DEVISEE OR RESIDUARY LEGATEE 203
See WILL.

CUSTOMS (1)—HARBOURING UNCUSTOMED GOODS—*Necessity of proving Mens Rea—Onus of Proof—Customs Consolidation Act*, 1876 (39 & 40 *Vict., c.* 36) *section* 186—*Finance Act*, 1934 (24 & 25 *Geo.* 5, *c.* 32) *section* 16 (2). The defendant in a customs prosecution was charged with having knowingly harboured uncustomed goods, viz., five bullocks and two heifers, imported from the Irish Free State into Northern Ireland, with intent to defraud His Majesty the King of the duties thereon, contrary to section 186 of the Customs Consolidation Act, 1876. It was also charged against him that he did not, when required, furnish proof as provided under section 16 of the Finance Act, 1934, to the satisfaction of the Commissioners of Customs and Excise, that the cattle had not been imported from the Irish Free State, and that under section 186 of the Customs Consolidation Act, 1876, he had incurred a penalty of £225, being treble the duty paid value of the cattle, for which the Commissioners of Customs had elected to sue. A statement had been given by the defendant to the police in which he professed to account for the history of the cattle. No evidence was given at the hearing of the complaint at petty sessions contradicting the defendant's statement. At the conclusion of the complainant's case before the Justices, it was submitted on behalf of the defendant that as no evidence of *mens rea* on the part of the defendant had been given, the defendant was entitled to a direction. On behalf of the complainant it was submitted that by reason of the provisions of section 16 (2) of the Finance Act, 1934, it was not necessary in proceedings under section 186 of the Customs Consolidation Act, 1876, claiming penalties for harbouring uncustomed goods to establish *mens rea* on the part of the defendant. The Justices refused the application for a direction made on behalf of the defendant and convicted the defendant of the offence charged but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the Justices were wrong in law in holding that it was not now necessary for the complainant by reason of the provisions of section 16 (2) of the Finance Act, 1934, to establish *mens rea* on the part of the defendant, and that the onus of proving guilty knowledge still lay upon the prosecution. *R.* (*King*) *v. Samuel Glass.*
K.B.D. 144

CUSTOMS (LAND BOUNDARY) REGULATIONS—ULTRA VIRES 1
See CUSTOMS (2).

CUSTOMS (2)—QUESTIONS PUT BY CUSTOMS OFFICER—*Failure to answer truly—No evidence of importation—Whether Regulation ultra vires—Customs Consolidation Act*, 1876 (39 & 40 *Vict., c.* 36) *sections* 132, 147 *and* 168 *—Irish Free State* (*Consequential Provisions*) *Act*, 1922, *Session* 2 (13 *Geo.* 5, *c.* 1) *section* 4 (1) *and* (2)—*Customs* (*Land Boundary*) *Regulations*, 1933, *Regulation* 12 (2). The prosecutor was convicted at C. Petty Sessions for failing to answer truly, contrary to section 4 (1) and (2) of the Irish Free State (Consequential Provisions) Act, 1922, and Regulation 12 (2) of the Customs (Land Boundary)Regulations, 1933, questions, put to him by an officer of Customs, relating to the merchandise conveyed by him. No evidence was given that any of the cattle in question had ever been in the Irish Free State or had emanated therefrom. The prosecutor obtained a conditional order for the issue of a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the justices. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that as there was no evidence of importation there was no statutory obligation upon the prosecutor to answer truly the said questions. *Held also*, that, save in so far as it related to importation and exportation the said regulation was *ultra vires*. *R.* (*Allen*) *v. Justices of County Tyrone.*
K.B.D. 1

CUSTOMS (3)—Removing Uncustomed Cattle—Conviction—Justices' Order *imposing unlimited term of imprisonment—Amendment of Order limiting imprisonment to six months—Conditional Order obtained before amendment of Order—Conditional Order not served on Justices until after amendment of Order.* A summons charged the prosecutor with being knowingly concerned in removing certain uncustomed cattle, to wit, six bullocks contrary to section 186 of the Customs Consolidation Act, 1876, whereby he had forfeited the penalty of treble the duty paid value of the cattle for which the Commissioners of Customs and Excise had elected to sue. The complaint came before the Justices on 12th December, 1934, when the prosecutor was convicted. The order made by the Justices provided that the prosecutor should forfeit and pay the sum of £175, and in default of payment within one month should be imprisoned without hard labour until that sum be paid. On 26th February, 1935, the Justices who had made the order of 12th December, 1934, amended their order. The order as amended provided that the prosecutor in default of payment within one month should be imprisoned without hard labour for a period of six months unless the penalty be sooner paid. On 22nd February, 1935, before the Justices had amended their order, the prosecutor obtained a Conditional Order for a Writ of Certiorari to remove into the King's Bench Division, for the purpose of being quashed, the orders made by the Justices. The Conditional Order was not, however, served on the Justices until 27th February, 1935, the day after the Justices had amended their order. On motion to make the conditional order absolute, notwithstanding cause shown. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the conditional order must be made absolute. *R. (M'Clave) v. Justices of County Tyrone* K.B.D. 69

CUSTOMS (4)—Summary Jurisdiction—Evasion of duty—*Dealing with cattle imported without payment of duty—Conviction*—Certificate *signed by order of Commissioners of Customs and Excise that the same cattle had been found in possession or control of two other persons—Accused not named in certificate—Whether certificate relates only to the goods and is admissible in evidence against any person dealing with the goods where person not named in certificate—Whether certificate if admissible casts onus of proof on defendant though not named in certificate—Finance Act*, 1934 (24 & 25 *Geo.* 5, *c.* 32) *section* 16. The defendant was charged at petty sessions on 26th September, 1934, with being knowingly concerned in an attempted evasion of customs duty by dealing with two cattle imported from the Irish Free State into Northern Ireland with intent to defraud, contrary to section 186 of the Customs Consolidation Act, 1876. The principal evidence against the defendant was a certificate signed by order of the Commissioners of Customs and Excise to the effect that some of the cattle in respect of which he was charged were found in the possession or control of C. O'D., on 13th July, and that on 15th July, some of the same cattle were found in possession of A. M., and that C. O'D. and A. M. being required to furnish proof that the goods had not been imported from the Irish Free State or that customs duty had been paid on them, did not furnish proof to the satisfaction of the Commissioners of Customs and Excise as provided by section 16 of the Finance Act, 1934. The justices convicted the defendant of the offence with which he was charged, but stated a case for the opinion of the King's Bench Division as to whether they were right in law in convicting the defendant of the charge, and whether the certificate related only to the goods and was valid and admissible in evidence against any person dealing with the goods, whether such person is or is not named in the certificate, and whether if admissible the certificate casts the onus of proof upon the defendant though not named in the certificate. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the certificate was wrongly admitted in evidence against the defendant and his conviction should not stand; *Held also*, that as the defendant was never required to explain his possession of the cattle and was afforded no opportunity of making an explanation, section 16 of the Finance Act, 1934, never applied to his case, and that the onus of proof rested on the prosecution and not on the defendant. *R. (Emerson) v. Haughey* K.B.D. 186

CUSTOMS (5)—SUMMARY JURISDICTION—JURISDICTION OF JUSTICES—*Conviction*—"*Harbouring*:"—*Whether cattle which had been detained by the police on 28th July and were from that time under their control could be properly found by the justices to be harboured on the following day*—*Distinction between Detention and Seizure*—*Insufficiency of evidence*—*Certiorari*—*Power of Superior Court to examine evidence.* The prosecutor was charged with having knowingly harboured uncustomed cattle imported from the Irish Free State into Northern Ireland, with intent to defraud the King of his duties contrary to the Customs Consolidation Act, 1876. Separate informations were laid and summonses brought (*a*) for the recovery of the penalty of £744, and (*b*) for an order for the forfeiture and condemnation of the cattle. The offence was alleged to have been committed on 29th July, 1934. The Justices convicted in both cases. The prosecutor obtained a conditional order for certiorari to quash both of the convictions. In his affidavit he stated that on 28th July, 1934, the police entered upon his lands and found there the sixteen cattle which were the subject matter of the proceedings. The police remained on duty on the lands until the following day, 29th July, under orders not to allow anyone to remove the cattle. On that day they were moved by the police. The prosecutor also stated in his affidavit that a police sergeant gave evidence before the magistrates that the cattle had been detained on 28th July. He also stated that the police took control of the cattle at 10 p.m. on 28th July, and remained in charge until the 29th July, that the police had no authority to enter upon his lands, and that no evidence was tendered that he had harboured cattle on 29th July. At the hearing before the magistrates, an application was made on behalf of the Commissioners of Customs and Excise to amend the summons to include harbouring on 28th July, but the magistrates refused to do so, considering such amendment unnecessary. A conditional order for a writ of certiorari was granted by the Lord Chief Justice on the grounds that the orders were made without and in excess of jurisdiction, that they were bad upon their face, and that the police had no authority to enter the lands or seize the cattle. Cause having been shown the matter came before the King's Bench Division, consisting of Moore, L.C.J., and Brown, J., who held that as previous to the 29th July, 1934, the cattle had been taken out of the control of the prosecutor, he could not have been harbouring them on that date. The Lord Chief Justice, who delivered the judgment of the Court, also stated that the Court threw no doubt on the *King* (*Martin*) *v. Mahony* ([1910] 2 I R. 695), which in the opinion of the members of the Court did not affect the case. The cause shown was therefore disallowed. The Commissioners of Customs and Excise appealed to the Court of Appeal. *Held*, by the Court of Appeal (Andrews, L.J., Best, L.J., and Megaw, J.), reversing the judgment of the King's Bench Division, that the Justices were justified in holding that the prosecutor harboured the cattle on 29th July, during the greater portion of which day they were merely detained and had not been seized by the police. *Held, also*, that even if the Justices were wrong in law in holding as they did, their order could not on that ground be quashed on certiorari. *The King* (*Martin*) *v. Mahony* ([1910] 2 I.R. 695) considered and followed. *R.* (*Brooks*) *v. Justices of County Down.* .. .. C.A. 115

CUSTOMS (6)—SUMMARY JURISDICTION—JURISDICTION OF JUSTICES—*Whether power in justices to impose unlimited term of imprisonment*—*Customs Consolidation Act*, 1876 (39 & 40 *Vict.*, *c.* 36) *section* 232, 237—*Customs and Inland Revenue Act*, 1879 (42 & 43 *Vict.*, *c.* 21) *section* 12, *Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58). *section* 18. The prosecutor was charged at petty sessions on a summons with being *inter alia* knowingly concerned in a fraudulent evasion of duties of customs in respect to ten head of cattle. He was convicted and was ordered to pay the sum of £300 or in default to be imprisoned until that sum be paid or discharged according to law. On an application to make absolute a conditional order for a writ of habeas corpus notwithstanding causes shown. *Held*, by the King's Bench Division (Moore, L.C.J., and Megaw, J.), that it was necessary for the justices to state the limit of the term of imprisonment imposed and that as no term was fixed, the order

of the justices was bad. *R.* (*McCaughey*) *v. Justices of County Tyrone* K.B.D. 10

CYPRÈS—Company—Alteration of Objects 97
See Company.

DEFENCES—One pleading Contributory Negligence—Consolidation 78
See Practice—Consolidation.

DESCENT—Consanguinity—*Fee farm grant—Conveyance for value—Death of purchaser intestate leaving widow but no issue surviving—Purchasers' real and personal estate less than £500 in value—Death of widow intestate—Whether heir at law of the husband or heir at law of the wife entitled to possession—Inheritance Act* 1833 (3 *&* 4 *Wm.* 4, *c.* 106), *sections* 1, 2—*Intestates' Estates Act,* 1890 (53 *&* 54 *Vict., c.* 29), *sections* 1, 2. Premises held under a fee farm grant, subject to a yearly rent were conveyed for value to P. B. The purchaser died intestate leaving his widow but no issue surviving. His real and personal estate amounted to less than £500 in value, and all passed under section 1 of the Intestates' Estates Act, 1890, to his widow, who entered into and remained in possession until she died intestate. Thereupon her brother, the defendant, entered into possession as her heir at law. The plaintiff, who was heir at law of her husband, claimed possession, contending that title must be traced from P. B. as the last purchaser. He brought a civil bill for ejectment on the title of the premises. *Held*, by Andrews, L.J., affirming the Recorder of L., that the widow acquired the land "otherwise than by descent," and being the last person to do so was therefore under the Inheritance Act, 1833, the purchaser from whom descent should be traced. The defendant, the widow's heir at law, was therefore entitled to remain in possession of the premises. *Bradley v. McAtamney*. .. .. .. H.C.J. 74

DETENTION AND SEIZURE—Distinction 115
See Customs (5).

ERROR IN LAND REGISTRY MAP—Rectification 197
See Land Registry.

ESTOPPEL—Tenancy—Trust 45
See Soldiers' and Sailors' Land Trust.

EVIDENCE—Certificate of Commissioners of Customs and Excise 186
See Customs (4).

EVIDENCE OF IMPORTATION—Questions by Customs Officer 1
See Customs (2).

EVIDENCE—Power of Superior Court to Examine .. 115
See Customs (5).

FAILURE TO ANSWER QUESTIONS—Customs 1
See Customs (2).

FUNCTIONS OF MINISTRY OF COMMERCE—Consent—Alteration of Memorandum 97
See Company.

HARBOURING—Distinction between Detention and Seizure 115
See Customs (5).

HEIR-AT-LAW—Estate under £500—Death of Husband Intestate—Death of Widow Intestate 74
See Descent.

IMPRISONMENT—Unlimited Term—Jurisdiction of Justices 10
See Customs (6).

INFLUENCE, UNDUE .. 16
See Undue Influence.

INTESTACY—Estate under £500—Deaths of Husband and Widow Intestate—Heir-at-Law 74
See Descent.

JURISDICTION—County Court Judge—Judge of Assize—Civil Bill for Trespass 158
See Seizure of Cattle.

JURISDICTION OF JUSTICES—Imprisonment — Unlimited Term 10
See Customs (6).

LAND REGISTRY—ERRORS IN LAND REGISTRY MAPS—RECTIFICATION—*Jurisdiction—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict., c.* 66) *section* 34 (2)—(*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34) *section* 32 (6). A holding 7 *a.* 1 *r.* 30 *per.* in area consisting of a farm on the West side of the county road and small garden and house on the East side of the county road was vested in the appellants under the Land Purchase Acts and subsequently registered on Folio No. 14152 Co. Armagh. In the Land Registry Map, however, the lands comprised in the said folio were shown as including only the lands on the West side of the county road. The house and garden on the East side of the county road were not shown as being included in the said folio. This small house and garden were surrounded by and appeared physically to form part of a farm on the East side of the county road which had been in the occupation of Mary Lambe and subsequently became vested in the Land Purchase Commission subject to the payment of a purchase annuity by Mary Lambe. Before any order was made vesting the said holding in the said Mary Lambe default was made in the payment of the said purchase annuity and the Ministry of Finance caused the said holding to be sold to the respondent, Alice Trainor. The holding was duly vested in the said Alice Trainor and was subsequently registered on Folio No. 21605 Co. Armagh. The holding comprised 7 *a.* 0 *r.* 25 *per.*, which did not include the area of the small house and garden. The farm was described in the vesting order and in the folio as being 7 *a.* 0 *r.* 25 *per.* in area ; but in the Land Registry map the small house and garden were shown as being included in the lands comprised in Folio 21605. *Held*, reversing the order of Megaw, J., that the Court has jurisdiction under section 34 (2) of the Local Registration of Title (Ireland) Act, 1891, to make an order amending the said Land Registry Map. *In the Matter of the Local Registration of Title (Ireland) Act*, 1891, *and of Alice Trainor, a registered owner of land, Folio* 21605, *County Armagh* .. .. C.A. 197

LICENCE TO SELL MILK IN NORTHERN IRELAND 131
See SALE OF MILK.

LIEN—SOLICITOR—COSTS .. 64
See SOLICITOR.

LIMITATION OF ACTIONS—WHEN STATUTE RUNS 16
See UNDUE INFLUENCE.

MAP—LAND REGISTRY—RECTIFICATION 197
See LAND REGISTRY.

MEMORANDUM OF ASSOCIATION
ALTERATION OF OBJECTS—
Confirmation by Court .. 97
See COMPANY—ASSOCIATION NOT FOR PROFIT.

MENS REA—ONUS OF PROOF .. 144
See CUSTOMS (1).

MILK AND MILK PRODUCTS ACT (N.I.), 1934—WHETHER ULTRA VIRES 131
See SALE OF MILK.

PERSON—MEANING OF—MILK AND MILK PRODUCTS ACT (N.I.), 1934 131
See SALE OF MILK.

PRACTICE—COMPANY—REGISTRATION OF CHARGE—EXTENSION OF TIME—EX PARTE APPLICATION—*Companies Act* (*Northern Ireland*), 1932 (22 & 23 *Geo.* 5, *c.* 7) *sections* 77 *and* 83. An application made under section 83 of the Companies Act (Northern Ireland), 1932, to extend the time for the registration of the charge in the Company's register may not be made *ex parte* but must be made upon notice of motion or summons. *In the Matter of an Indenture or Mortgage, dated 7th day of April*, 1933, *and made between Coates' Buildings, Limited, and the Law Union and Rock Insurance Company, Limited, and in the Matter of the Companies Act* (*Northern Ireland*), 1932, *section* 83 (1) C.D. 156

PRACTICE—CONSOLIDATION—SEPARATE ACTIONS *by husband and wife for negligence arising out of the same accident—Defence of contributory negligence to husband's claim—Whether two actions should be tried together as one action—R. S. C. Order* 49, *rule* 8 ; *Order* 16. *rules* 1 *and* 4. Two actions for negligence arising out of a motor accident were brought by a husband and wife against the defendant. The husband was driving his own car at the time of the accident and his wife

was a passenger in the car. The defence in the first action contained a plea of contributory negligence on the part of the husband, but there was no such plea in the second action. A motion brought by the defendant for an order that the two actions should be tried together as one action was refused. The defendant appealed to the Court of Appeal. *Held* (Andrews, L.J., dissenting), reversing the order of Moore, L.C.J., that, notwithstanding the plea of contributory negligence in the first action, the two actions could properly be tried together as one action. *Craig v. Hamill* .. .. C.A 78

PRAYERS—Payment by—Consideration 16
See Undue Influence.

PROOF, ONUS OF—Certificate of Commissioners of Customs and Excise 186
See Customs (4).

PROOF, ONUS OF—Mens Rea 144
See Customs (1).

QUESTIONS BY CUSTOMS OFFICER—Failure to Reply 1
See Customs (2).

RECTIFICATION OF LAND REGISTRY MAP 197
See Land Registry.

REGISTRATION—Devise of Registered Land—Whether Costs borne by devisee or by Residuary devisee 203
See Will.

REGISTRATION OF CHARGE—Company — Extension of Time 156
See Practice—Company.

RENTS OF COTTAGES FOR EX-SERVICEMEN—Power to charge 45
See Statutory Provision of Cottages.

SALE OF MILK IN NORTHERN IRELAND—Milk and Milk Products Act (*Northern Ireland*), 1934 (24 & 25 *Geo.* 5, *c.* 16) *sections* 1 (1) (*c*), 2 (2)—*Whether section* 2 *of the Act. requiring a licence for the sale of milk in Northern Ireland applies to milk coming from outside Northern Ireland, the producer not having obtained a licence to sell milk in Northern Ireland—Meaning of "Person"—Validity of Milk and Milk Products Act* (*Northern Ireland*), 1934 (24 & 25 *Geo.* 5, *c.* 16)—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67) *section* 4 (7). The defendant was convicted at L. Petty Sessions for having sold milk in the city of L. otherwise than in accordance with the Milk and Milk Products Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 16) and the licence required under that Act, in contravention of the provisions of sub-section 1 (*c*) of section 1. The defendant appealed from that decision to the Recorder of L., who affirmed the decision of the justices on the ground that section 2 of the Milk and Milk Products Act (Northern Ireland), 1934, requiring a licence for the sale of milk in Northern Ireland, applies to milk coming from outside Northern Ireland, even where the producer had not obtained a licence to sell milk in Northern Ireland. The defendant appealed to the Court of Appeal in Northern Ireland, by virtue of section 50 of the Government of Ireland Act, 1920, and section 1 of the Irish Free State (Consequential Provisions) Act, 1922 (Session 2). *Held*, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.), dismissing the appeal (*a*) that the word "person" in section 1 (1) of the Milk and Milk Products Act (Northern Ireland), 1934, applies to all producers irrespective of the place of production, and that the word "milk" in section 1 (1) (*c*) must be interpreted in the same way: (*b*) that the primary object of the Milk and Milk Products Act (Northern Ireland), 1934, was not interference with trade, and that the Act did not therefore come within the limitation imposed by section 4 (7) of the Government of Ireland Act, 1920. *R.* (*Lynn*) *v. Gallagher* .. .. .. C.A. 131

SEIZURE AND DETENTION OF GOODS—Distinction 115
See Customs (5).

SEIZURE OF CATTLE on behalf of Commissioners of Customs—*Notices by plaintiffs demanding return of the cattle—Proceedings for condemnation of cattle as uncustomed goods—Civil Bills for trespass and for trover and conversion of the cattle—Jurisdiction of County Court Judge and Judge of Assize to hear the civil bills*

while proceedings for condemnation were pending—Statutory remedy—Powers of Appeal Judge. The plaintiffs' cattle were seized by the defendant on behalf of the Commissioners of Customs and Excise, on the 11th February, 1935. On the 16th February, 1935, demands in writing were served by the plaintiffs on the defendant, requiring the return of the cattle. On the 26th February, 1935, civil bills were issued by the plaintiffs for trespass, and for trover and conversion of the cattle against the defendant. The Commissioners of Customs and Excise directed proceedings to be taken for condemnation of the cattle under section 207 of the Customs Consolidation Act, 1876. On 5th March, 1935, the Commissioners of Customs and Excise certified that the plaintiffs did not furnish proof that the cattle had not been imported from the Irish Free State or that customs duty had been paid on them. On 7th March, 1935, the plaintiffs were notified that the cattle were seized as forfeited and that proceedings would be taken for their forfeiture and condemnation. On 15th March, 1935, summonses were issued against the plaintiffs in respect of the cattle claiming forfeiture and condemnation. The summonses were listed for hearing at L. Petty Sessions, on 27th March, 1935, but owing to the number of cases listed for hearing, they were not reached, and they were adjourned to 12th April, 1935. Prior to 12th April, 1935, the civil bills brought by the plaintiffs for trespass, and for trover and conversion of the cattle, were heard by the County Court Judge, when it was objected on the part of the defendant that the County Court Judge had no jurisdiction to hear the Civil Bills. The County Court Judge, having heard the civil bills, granted decrees in favour of the plaintiffs. On 12th April, 1935, the justices were informed that appeals were lodged against these decrees, and the Justices adjourned the hearing of the summonses for forfeiture and condemnation of the cattle until after the appeals had been determined, although objection was taken to that course on behalf of the Commissioners of Customs and Excise. The Judge of Assize heard the appeals from the Civil Bills ; he found as a fact that the cattle had not been smuggled, but stated a case for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) (Moore, L.C.J., dissenting), that the County Court Judge, and on appeal the Judge of Assize, had no jurisdiction to hear and determine the civil bills for trespass and for trover and conversion of the cattle, whilst the proceedings for the enforcement of penalties and condemnation of the cattle were actually pending. *McGrath v. Taylor ; Cooney v. Taylor.* C.A. 158

SOLICITOR—LIEN—CHARGING ORDER—*Property recovered or preserved —Judgment for costs—Cross-judgments —Legal Practitioners (Ireland) Act*, 1876 (39 & 40 *Vict., c.* 44), *section* 3. The defendant obtained in an action judgment with costs against the plaintiff. Execution was issued on the judgment, and a return of *nulla bona* was made. Subsequently an instalment order was made by the Lord Chief Justice after the plaintiff had been examined as to his means. The order provided for the payment of the amount due on the judgment by instalments of £10 0*s.* 0*d.* per quarter. No payment was made under this order. An application was made for the committal of the plaintiff for his failure to comply with this order, and an order was made committing the plaintiff to prison for six weeks, unless he should within one week from the service of the order pay the instalment. The plaintiff appealed from this order to the Court of Appeal. The Court of Appeal discharged the order and ordered the defendant to pay to the plaintiff the costs of the appeal when taxed and also ordered that the plaintiff and defendant should respectively abide their own costs of the order under which the plaintiff was committed to prison for six weeks. An application was made to the Court of Appeal upon the hearing of the appeal from the order of committal, on behalf of the defendant that the costs ordered to be paid by the defendant should be set off against the costs due by the plaintiff to the defendant. This application was refused and the Court of Appeal left the parties to their respective remedies against each other. The plaintiff's solicitors, who had obtained from the plaintiff in the Court of Appeal, the order for costs, applied for a charging order on such costs under the Legal Practitioners (Ireland) Act, 1876. *Held*, by Moore, L.C.J., that such costs were " property " recovered " within the statute in

respect of which an order of charge could be made. *Garbett v. Cooper (No. 2)* .. .. .. K.B.D. 64

STATUTORY PROVISION OF COTTAGES FOR EX-SERVICEMEN —Power of Trust to Charge Rents —*Relationship of Trust to Ex-servicemen —Agreements of tenancy—Estoppel—Irish Land (Provision for Sailors and Soldiers) Act*, 1919 (9 *& 10 Geo. 5, Ch. 82) sections 1 and 4, (4), (5), (6) and (7) —Irish Free State (Consequential Provisions) Act*, 1922 (13 *Geo. 5, secs. 2, Ch. 2, section 3—Land Trust (Powers) Act (Northern Ireland)*, 1923 (13 *& 14 Geo. 5, Ch. 19), sections 1 and 3—Irish Sailors' and Soldiers' Land Trust (Amending) Regulations*, 1925, *Statutory Rules and Orders* 1925, *No.* 303, *Clause* 16. By section 4 of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, the Local Government Board was given power to make and carry out schemes for the provision of cottages for the accommodation of men who had served in any of His Majesty's naval, military, or air forces during the Great War and who satisfied the Board as to their fitness and suitability. Subsequently by virtue of the provisions of section 3 of the Irish Free State (Consequential Provisions) Act, 1922, all the powers conferred upon the Local Government Board for Ireland were vested in the defendants. Each of the plaintiffs having duly satisfied the Trust as to his fitness and suitability entered into an agreement of tenancy with the defendants and was provided with a cottage in respect of which he paid rent for several years. On a claim for a declaration that the plaintiffs were entitled to occupy the said cottages for life, free from all rent, rates, taxes, and all other burdens and charges. *Held* (affirming the decision of Megaw, J.), that the relationship between the defendants and the plaintiffs was merely that of landlord and tenant and not that of trustee and *cestui que* trust, and that the defendants had power to charge rents for the said cottages. *Hanna and Others v. Irish Sailors' and Soldiers' Land Trust* .. .. .. C.A. 45

STATUTES—

——3 & 4 Wm. 4, c. 106, ss. 1, 2 .. 74
See Descent.

——16 & 17 Vic., c. 113, s. 20 .. 16
See Undue Influence.

——24 & 25 Vic., c. 32, s. 16 .. 186
See Customs (4).

——39 & 40 Vic., c. 44, s. 3 .. 64
See Solicitor—Lien.

——39 & 40 Vic., c. 36, ss. 132, 147, 168 1
See Customs (2).

——39 & 40 Vic., c. 36, s. 186 .. 144
See Customs (1).

——39 & 40 Vic., c. 36, s. 232 .. 10
See Customs (6).

——42 & 43 Vic., c. 21, s. 12 .. 10
See Customs (6).

——53 & 54 Vic., c. 29, ss. 1,2 .. 74
See Descent.

——54 & 55 Vic., c. 66, s. 34 (2) .. 197
See Land Registry.

——54 & 55 Vic., c. 66, ss. 81 (1), 87 (1) 203
See Will.

——8 Ed. 7, c. 69, s. 20 97
See Company.

——4 & 5 Geo. 5, c. 1, s. 4 (1), (2) 10
See Customs (6).

——9 & 10 Geo. 5, c. 82, ss. 1, 4 (4), (5), (6), (7) 45
See Statutory Provisions of Cottages.

——10 & 11 Geo. 5, c. 67, s. 4 (7) 131
See Sale of Milk.

——13 Geo. 5, c. 1, s. 4 (1), (2) .. 10
See Customs (6).

——13 Geo. 5, Sess. 2, c. 2, s. 3 .. 45
See Statutory Provision of Cottages.

——13 & 14 Geo. 5, c. 19, ss. 1, 3 45
See Statutory Provision of Cottages.

——15 & 16 Geo. 5, c. 34, s. 32 (6) 197
See Land Registry.

——22 & 23 Geo. 5, c. 7, ss. 5, 18 (1), 112 97
See Company.

——22 & 23 Geo. 5, c. 7, ss. 77, 83 156
See Practice—Company.

——24 & 25 Geo. 5, c. 16, ss. 1 (1c), 2 (2) 131
See Sale of Milk.

——24 & 25 Geo. 5, c. 32, s. 16 (2) 144
See Customs (1).

STATUTORY REMEDY—CIVIL BILL —PETTY SESSIONS .. 158
See SEIZURE OF CATTLE.

STATUTORY RULES, ORDERS AND REGULATIONS—
——1905 R.S.C. (Ir.) Or. 16, rr. 1, 4 78
See PRACTICE—CONSOLIDATION.

——1905 R.S.C. (Ir.) Or. 49, r. 16 78
See PRACTICE—CONSOLIDATION.

——1925 Irish Sailors' and Soldiers' Land Trust (Amending) Regulations Statutory Rules and Orders 1925, No. 303, Cl. 16 45
See STATUTORY PROVISION OF COTTAGES.

——1933 Customs (Land Boundary) Regulations—
Regulation 12 (2) .. 1
See CUSTOMS (2).

TIME—EXTENSION OF—REGISTRATION OF CHARGE .. 156
See PRACTICE—COMPANY.

UNDUE INFLUENCE—CONSIDERATION—PAYMENT BY PRAYERS—*Statute of Limitations* (16 & 17 *Vict.*, *c.* 113) *section* 20—*Acknowledgment.* The plaintiff sued for the sum of £1,105 3*s.* 0*d.*, being the balance alleged to be due for work and labour done, moneys expended and services rendered as architect for the defendant, Canon M. and the C. and P. Religious Order, in connection with the planning and erection of buildings at B., in the County of A. The defendants pleaded: (*a*) an agreement in which it was a term that the Religious Order should perform certain services in the nature of prayers for the benefit of the plaintiff and his family, and that the plaintiff would accept performance of the said services, together with the payment of a sum of £200 in full satisfaction of this portion of his claim; (*b*) that the labour and work were done, the money expended and the services rendered voluntarily and as an act of courtesy by the plaintiff; (*c*) that the plaintiff's claim in so far as it related to all items prior to January 15th, 1928, was barred by the Statute of Limitations. The defendants also, whilst denying liability, brought into Court the sum of £370 as being sufficient to discharge their liability, if any. The plaintiff, in his reply, pleaded that if he made the alleged agreement he was induced to do so by the undue influence of his spiritual adviser, the defendant Canon M., and that there was no consideration for this agreement. In reply to the defence of the Statute of Limitations, the plaintiff relied upon an acknowledgment of his claim in writing signed by the defendants or their agent and by part payment. In answer to the questions put to them the jury found that the plaintiff was induced to enter into the agreement alleged by the undue influence of Canon M., that the payments made by the defendants M. J. K. and C. G. C. in 1930 and 1932 were not made on foot of the general account of the plaintiff, and that Canon M. acted as agent for the other defendants in all these transactions. The action was tried before the Lord Chief Justice who abstained from directing any judgment to be entered on the findings of the jury. Both the plaintiff and the defendant applied by motions for judgment or a new trial. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.):—(*a*)that the finding of the jury of undue influence on the part of Canon M. could not be interfered with; (*b*) that there was evidence to support the finding of the jury that the payments made by the defendants M. J. K. and C. G. C. in 1930 and 1932 were not made on foot of the general account of the plaintiff; (*c*) that the plaintiff's claim was not saved from the operation of the Statute of Limitations by an acknowledgment in writing; (*d*) that the plaintiff, in order to avail himself of the submission that the undue influence prevented the Statute of Limitations running against him, must prove that such undue influence continued to within six years before action brought; and that if he intended to rely on such point, it was for him to obtain a finding from the jury to that effect. *Held*, by Andrews, L.J., that there was no sufficient consideration in law for the agreement. *O'Neill v. Murphy and Others* C.A. 16

WILL—SPECIFIC DEVISE—RESIDUE—WHETHER COSTS *of having lands registered should be charged against residue or against devisee of lands—Local Registration of Title* (*Ireland*) *Act*, 1891 (54 & 55 *Vict.*, *c.* 66) *sections* 84 (1), 87 (1). A testator devised his farm of land to one of his daughters for her life, and after her

death to her son, all the residue of his property went to another daughter. His executors took out probate of his will. The farm was subject to the payment of instalments under the Land Purchase Acts, and in winding up the estate the executors had the land registered, at a charge of £6 13*s.* 6*d.*, which was debited against the residue. The plaintiff, the residuary devisee, brought a civil bill for £6 13*s.* 6*d.*, being the amount by which her residue under the will was decreased. The County Court Judge gave a decree for £6 13*s.* 6*d.* in favour of the plaintiff but the defendant appealed to the Judge of Assize. *Held*, by Moore, L.C.J., sitting as Judge of Assize, affirming the decree made by the County Court Judge of F., that the costs of registration should be borne by the person in receipt of the specific legacy and not by the residuary estate. *Stinson v. Crozier.* H.C.J. 203

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